No. 05-593
Title: Pat Osborn, Petitioner
v.
Barry Haley, et al.
Docketed: November 10, 2005
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (04-5716, 04-5820)
Decision Date: September 8, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Nov 7 2005	Petition for a writ of certiorari filed. (Response due December 12, 2005)
Nov 30 2005	Waiver of right of respondents Gaye Verdi, et al. to respond filed.
Dec 8 2005	Order extending time to file response to petition to and including January 11, 2006.
Jan 6 2006	Order further extending time to file response to petition to and including February 10, 2006.
Feb 9 2006	Order further extending time to file response to petition to and including February 17, 2006.
Feb 17 2006	Brief of respondent Barry Haley in opposition filed.
Feb 27 2006	Reply of petitioner Pat Osborn filed. (Distributed)
Mar 1 2006	DISTRIBUTED for Conference of March 17, 2006.
Mar 6 2006	Response Requested . (Due April 5, 2006)
Mar 31 2006	Brief of respondents Gay Verdi f/k/a Gaye Luber and Land Between the Lakes Association , inc.in opposition filed.
Apr 6 2006	Reply of petitioner to brief in opposition of Non-Federal respondents filed. (Distributed)
Apr 12 2006	DISTRIBUTED for Conference of April 28, 2006.
May 8 2006	DISTRIBUTED for Conference of May 11, 2006.
May 15 2006	Petition GRANTED In addition to the Questions presented the parties are directed to brief and argue the following Question: Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. Sec. 1447(d).
Jun 1 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including July 14, 2006.
Jul 14 2006	Brief amici curiae of Califorina, et al. filed.
Jul 14 2006	Joint appendix filed.
Jul 14 2006	Brief of petitioner Pat Osborn filed.
Aug 2 2006	Extension of time within which to file respondents' briefs on the merits to and including September 1, 2006.
Aug 14 2006	SET FOR ARGUMENT on Monday, October 30, 2006.
Aug 14 2006	CIRCULATED.
Sep 1 2006	Brief of respondent Barry Haley filed. (Distributed)
Sep 1 2006	Brief of respondents Gay Verdi f/k/a Gaye Luber, and Land Between the Lakes Association, Inc. filed. (Distributed)
Sep 21 2006	Record received from U.S.C.A. for th 6th Circuit. (1 binder)
Sep 29 2006	Record received from U.S.D.C. for Western District of Kentucky. (1 envelope)

Oct 6 2006	Reply of petitioner Pat Osborn filed. (Distributed)
Oct 30 2006	Argued. For petitioner: Eric Grant, Sacramento, Cal. For respondents: Douglas Hallward-Driemeier, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

PAT OSBORN

Petitioner

v.

BARRY HALEY; GAYE LUBER; AND
LAND BETWEEN THE LAKES ASSOCIATION, INC.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When a federal employee is sued in a civil action in a state court, the Westfall Act, 28 U.S.C. § 2679(d)(2), authorizes the Attorney General to remove the action to federal district court—and seek to substitute the United States as the party defendant in place of the employee—by certifying that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." As the court of appeals expressly acknowledged, this case presents two questions "that have split the circuits" for more than a decade, namely:

1. Whether the Westfall Act authorizes the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident solely by denying that such incident occurred at all.

2. Whether the Westfall Act forbids a district court to remand an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Act.

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PETITION FOR WRIT OF CERTIORARI

Ms. Pat Osborn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (App. 1a-11a) is reported at 422 F.3d 359. The opinions of the District Court for the Western District of Kentucky (App. 12a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves provisions of the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known and cited as the "Westfall Act" (App. 26a-30a).

The immediately pertinent part of the Act, codified at 28 U.S.C. § 2679(d)(2), provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be

substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

STATEMENT OF THE CASE

1. On a narrow peninsula in western Kentucky, between Lake Barkley to the east and Kentucky Lake to the west, sits the Land Between the Lakes National Recreation Area ("LBL") operated by the U.S. Forest Service. At all relevant times, respondent Barry Haley was a Forest Service employee at LBL; respondent Gaye Luber was the executive director of respondent Land Between the Lakes Association, Inc. ("LBLA"), a private contractor that provided the Forest Service with staff for gift shops, visitor centers, and interpretive areas at LBL. Until petitioner was terminated in the events that gave rise to this case, she was an employee of LBLA. *See generally* App. 3a, 20a-21a.

2. Petitioner sued Luber and LBLA in Trigg County (Kentucky) Circuit Court, alleging that she was discharged in violation of public policy. *See* App. 21a. In the same action, petitioner also sued Haley for wrongfully interfering with her employment relationship with LBLA, alleging that "Haley influenced LBLA . . . to fire her after she had a run-in with Haley." App. 3a. If this allegation is true, Haley's conduct violated "policies [that] prohibited Forest Service employees like Haley from 'participat[ing] in any LBLA decision concerning the relationship of the LBLA to the Forest Service, including but not limited to . . . hiring or firing LBLA employees.'" *Id.* (alterations in original). Indeed, the United States (which is representing Haley) has "conceded that if Haley induced [petitioner's] firing, he acted *outside* the scope of his employment." *Id.* (emphasis added).

Despite this concession, the Attorney General—acting via the local United States Attorney, *see* 28 C.F.R. § 15.4(a) —issued a "certification that Haley had been acting *within* the scope of his employment at the time of the incident giv-

ing rise to [petitioner's] allegations." App. 3a (emphasis added). Based on this certification, and invoking the Westfall Act, 28 U.S.C. § 2679(d)(2), the United States removed the state-court litigation to the District Court for the Western District of Kentucky. *See* App. 3a. In that court, and again invoking the Act, the United States sought to substitute itself for Haley and, thereafter, to dismiss the case based on petitioner's failure to exhaust her administrative remedies under the Federal Tort Claims Act. *See* App. 3a, 19a.

To reconcile the apparent contradiction between the concession that Haley's alleged conduct was "outside" the scope of his federal employment and the certification that Haley in fact acted "within" the scope of such employment, the United States simply "denied . . . that Haley interfered with [petitioner's] continued employment" at all. App. 3a; *accord* App. 13a-14a ("Haley has signed a declaration stating that he had no communication with [Luber] regarding the decision to fire [petitioner]."). In other words, the Attorney General essentially issued—and removal was premised upon—"a Westfall Act certification that denie[d] the occurrence of any injury-causing event." App. 2a.

3. In reviewing that certification for purposes of the United States' motion to substitute itself for Haley, the district court pointed to "a dispute among the circuits—which the Sixth Circuit has not yet addressed—about how courts should deal with Westfall Act certifications based on an argument that no harm-causing incident ever took place." App. 14a. On the one side, the "First Circuit, in *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993), per then-Chief Judge (now Justice) Breyer," held that "'the [Attorney General's certification] cannot deny the occurrence of the basic incident charged.'" App. 14a (quoting 995 F.2d at 1124). *Wood* reasoned that "permitting 'a Westfall Act certificate simply to deny that anything occurred would extend a form of [official] immunity well outside the "respondeat superior" context to "egregious" torts allegedly committed at work,'" and it would permit the "'Attorney General and district judge

(rather than the jury) to decide whether allegations of such non-work-related torts were true or false.'" App. 14a (quoting 995 F.2d at 1128).

On the other side, observed the district court, the "D.C. Circuit rejected the First Circuit's analysis in *Wood* . . . and concluded that the district courts must, if necessary, resolve the merits of the underlying dispute, i.e., whether or not the harm-causing incident took place, even if doing so ousts [the plaintiff's] right to a trial by jury." App. 15a (citing *Kimbro v. Velten*, 30 F.3d 1501, 1508-10 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995)); *accord id.* (citing *Melo v. Hafer*, 13 F.3d 736 (3d Cir. 1994), as having adopted "the approach advocated by the dissenters in *Wood* and by *Kimbro*"). The district court "conclude[d] that the *Wood* majority has the better of the interpretive dispute surrounding Westfall Act certifications." App. 16a. Accordingly, the court denied the Government's motion to substitute. *See id.*

"Having concluded that the United States [was] not a proper party to this case," the district court confronted the question whether to remand the action to state court. App. 24a. Observing that "[t]he Sixth Circuit has not spoken to this issue and the authority among other circuits is split," the court decided that the Westfall Act "'does not bar this Court from remanding an intentional tort action against a federal employee after it has been determined that the employee was not acting within the scope of her employment'" and also that "'remand is authorized by the general remand statute, [28 U.S.C.] § 1447(c).'" App. 24a (quoting *Allstate Insurance Co. v. Quick*, 254 F. Supp. 2d 706, 725, 729 (S.D. Ohio 2002)). Accordingly, the district court remanded the action to the Trigg County Circuit Court. *See* App. 17a.

4. The United States appealed. (All circuits agree that orders remanding Westfall Act actions are appealable notwithstanding the seemingly categorical language of 28 U.S.C. § 1447(d).) The Court of Appeals for the Sixth Circuit began its opinion by observing that it confronted two

"issues that have split the circuits," namely: (1) "the procedural ramifications attendant to a Westfall Act certification that denies the occurrence of any injury-causing event"; and (2) "the jurisdictional consequences of a denial of substitution under the Act." App. 2a.

As detailed below, the court of appeals disagreed with the district court on both issues. As to the first, the Sixth Circuit "join[ed] the majority of the circuits addressing the issue in holding that where the Attorney General's certification is based on a different understanding of the facts than is reflected in the complaint, including a denial of the harm-causing incident, the district court must resolve the factual dispute." App. 8a (citation omitted). Therefore, the district court was directed to "resolve the factual disputes underlying the scope [of Haley's federal employment], including whether the alleged incident occurred" as it was described in petitioner's complaint. App. 11a.

As to the second issue, the Sixth Circuit "agree[d] with the majority view that the clear language of the [Westfall] Act forecloses remand" to state court. App. 10a. Therefore, "[e]ven if the district court finds that Haley acted outside the scope of his employment, it must nonetheless retain jurisdiction over this case." App. 11a.

REASONS FOR GRANTING THE PETITION

As the court below acknowledged, the federal courts of appeals are self-consciously split over (1) whether the Westfall Act authorizes the Attorney General to issue "incident-denying" certifications, and (2) whether the Act forecloses a district court from remanding an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Act. These acknowledged conflicts in the lower courts have persisted for more than a decade and are obviously entrenched. Because the instant case presents the two issues in simple and stark form, it is an excellent vehicle for finally resolving the long-standing splits on the questions presented.

I. As the Court Below Expressly Acknowledged, the Circuits Are Split on the Authority of the Attorney General to Issue "Incident-Denying" Certifications Under the Westfall Act.

1. Here, the United States "conceded that if Haley induced [petitioner's] firing, he acted outside the scope of his employment." App. 3a. At the same time, however, the United States "denied . . . that Haley interfered with [petitioner's] continued employment." *Id.* In essence, therefore, the Attorney General issued what the Sixth Circuit called a "Westfall Act certification that denie[d] the occurrence of any injury-causing event," App. 2a, or more succinctly, an "incident-denying" certification, App. 5a.

How have the courts of appeals grappled with incident-denying certifications? As told by the court below, *see* App. 4a-7a, the story centers largely on the exhaustive analysis by then-Chief Judge Breyer for the en banc First Circuit in *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993), and it extends to other courts' reactions to that analysis. We thus begin with the First Circuit's analysis of incident-denying certifications.

Wood involved state-law claims for assault, battery, and civil rights violations brought by the plaintiff against her former supervisor, a federal military officer; in essence, the plaintiff alleged that the defendant sexually harassed her on the job. *See id.* at 1123-24. The Attorney General issued a Westfall Act certification nominally asserting that the defendant was, at all relevant times, "acting within the scope of his office as a commissioned officer of the Armed forces of the United States." *Id.* at 1124. But in substance, the certification simply "den[ied] that any relevant incident had occurred," and the defendant's accompanying affidavit likewise "simply denied [the plaintiff's] factual allegations." *Id.* Indeed, as in the present case, *see* App. 3a, "the government did not deny that the acts would have fallen outside the 'scope of employment' had they occurred" as alleged by the plaintiff. 995 F.2d at 1124.

Wood framed the resulting legal issue as follows:

> This appeal focuses on whether the Attorney General may issue a Westfall Act certificate that simply denies that any injury-causing action occurred. Suppose a plaintiff claims that a federal employee committed acts clearly outside the scope of employment, as here, where the plaintiff has alleged sexual harassment amounting to "assault and battery." Can the Attorney General certify that there simply was no such event? To rephrase this question using the statutory terms [from 28 U.S.C. § 2679(d)(1) and (2)]: Can the certificate grant immunity simply by denying the occurrence of any "incident out of which the claim arose?" Would such a certificate fall within the scope of the immunity statute?

995 F.2d at 1124.

Chief Judge Breyer's comprehensive opinion for the en banc court answered all these questions emphatically in the negative. The opinion systematically examined the specific language of § 2679(d), the surrounding statutory scheme of the Westfall Act and the Federal Tort Claims Act, the purpose of federal employee tort immunity, the history of the Westfall Act, and recent judicial precedent. *See* 995 F.2d at 1124-29. The end result: "We therefore conclude that the certificate cannot assert 'immunity' simply by denying that anything occurred. We read the statute to mean what its words naturally say, namely that the Attorney General's certificate must assume the existence of an 'incident out of which the claim arose.'" *Id.* at 1128-29 (quoting 28 U.S.C. § 2679(d)(1) & (2)).

As stated above, the First Circuit took account of then-recent precedent in concluding that the Westfall Act does authorize the Attorney General to issue "incident-denying" certifications. *See id.* at 1128. At the appellate level, that precedent consisted solely of the Second Circuit's decision in

McHugh v. University of Vermont, 966 F.2d 67, 74 (2d Cir. 1992), which held that in making a certification under the Westfall Act, the Attorney General "may not deny that acts were within the scope of employment by denying that the acts occurred."[1]

2. In conflict with these decisions of the First and Second Circuits are several decisions that "expressly or impliedly reject the *Wood* majority's approach." App. 7a. The Third Circuit "respectfully disagree[d] with the *Wood* court and conclude[d] that the Attorney General may file a scope of employment certificate based on a finding that the defendant did not engage in the conduct alleged by the plaintiff." *Melo v. Hafer*, 13 F.3d 736, 746 (3d Cir. 1994); *accord id.* at 747 (holding that the Attorney General may file a Westfall Act certification even in "cases in which the plaintiff alleges conduct which is beyond the scope of the defendant's employment, but which the Attorney General determines did not occur").

The Eighth Circuit similarly "decline[d] to follow the holding in *Wood*"; instead, it "agree[d] with the dissenting judges in *Wood* (and with relevant cases from other courts) that nothing in the Westfall Act gives the district court the authority to refuse to substitute the United States on the ground that either the government or the employee denies the offensive conduct." *Heuton v. Anderson*, 75 F.3d 357, 360 (8th Cir. 1996). Finally, the D.C. Circuit "disagree[d]" with *Wood* because "the statutory language describing certification does not preclude a disavowal through certification that the harm-causing event actually occurred." *Kimbro v. Velten*, 30 F.3d 1501, 1507-08 (D.C. Cir. 1994), *cert. denied*,

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[1] The only other direct precedent was a decision of a district court in the Tenth Circuit, which similarly found invalid a Westfall Act certificate that was "limited to conveying [the defendant's] denial of engaging in [the alleged tortious] conduct." *Jackson v. United States*, 751 F. Supp. 911, 912 (D. Colo. 1990). The Tenth Circuit itself has not had occasion to address the issue.

515 U.S. 1145 (1995). To the contrary, as that court read the Westfall Act, "it does not matter . . . what the certification actually says—*i.e.*, whether it denies or recharacterizes the plaintiff's allegations of the employee defendant's conduct." *Id.*

3. There are good reasons to conclude that the Sixth Circuit chose the wrong side of the above-documented split. Judge Breyer's opinion in *Wood* sets forth these reasons in comprehensive fashion. Petitioner would draw attention to three doctrinal developments that postdate that opinion.

a. In this Court's one sustained consideration of the "statutory fog" of the Westfall Act, *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425 (1995), a four-Justice plurality confronted what the amicus curiae called "a potentially serious Article III problem." *Id.* at 434. The plurality denied the gravity of the alleged problem, reasoning as follows:

> Whether the [defendant] employee was acting within the scope of his federal employment is a significant federal question—and the Westfall Act was designed to assure that this question could be aired in a federal forum. Because a case under the Westfall Act thus "raises [a] question of substantive federal law at the very outset," it "clearly 'arises under' federal law, as that term is used in Art. III."

Id. at 435 (citation omitted) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983)).

Of course, a scope-of-employment determination cannot raise a "question of substantive federal law" if it raises no question of *law* at all. Yet the "incident-denying" certifications authorized by the Third, Sixth, Eighth, and D.C. Circuits lead inevitably to purely *factbound* determinations by the district court. *Kimbro*, for example, called upon the trial court to credit either (1) the plaintiff's allegation that the defendant employee "without provocation . . . viciously struck [her] on the right arm," or (2) the employee's "sworn

declaration claiming that she did not recall ever touching" the plaintiff. 30 F.3d at 1502. Here, the issue is whether "Haley influenced LBLA . . . to fire [petitioner] after she had a run-in with Haley." App. 3a. It is difficult to see how any of these factual issues is a "nonfrivolous federal question" or a "question of substantive federal law," as those terms were used by the *Lamagno* plurality.[2]

b. In its briefing below, the United States correctly argued that the official immunity conferred by the Westfall Act "closely resembles the qualified immunity from constitutional torts" considered in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Proof Brief for Defendant-Appellee Barry Haley at 16; *see also id.* (referring to "the closely related area of qualified immunity in suits for constitutional torts"). The point of the argument was that "a court must determine the immunity granted under the Westfall Act 'at the earliest possible stage,' i.e., 'long before trial.'" *Id.* at 16-17 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)). This point is a sound one, but the further implication suggested by the United States—that the immunity determination includes pretrial resolution of basic merits facts—is assuredly not.

To the contrary, qualified immunity doctrine implies precisely the opposite. Thus, in *Johnson v. Jones*, 515 U.S. 304, 313 (1995), the Court considered "the appealability of a portion of a district court's summary judgment order that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." The Court unanimously ruled that this kind of order is *not* appealable. The Court's first reason for so ruling goes to the nature of

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[2] To be sure, the four dissenters in *Lamagno* criticized the above-quoted reasoning by the plurality on the ground that it took too expansive a view of "Arising Under" jurisdiction. *See* 515 U.S. at 441-43 (Souter, J., dissenting). How much more would the dissent criticize a federal court's assuming jurisdiction over case merely to engage in mundane resolution of factual disputes on the order of "I didn't do it"?

the immunity determination: "a qualified immunity ruling . . . is . . . a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." *Id.* (alterations in *Johnson*) (quoting *Mitchell*, 472 U.S. at 530 n.10). Thus, "an appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts." *Id.* (quoting *Mitchell*, 472 U.S. at 528). That is so because "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim." *Id.* at 314 (quoting *Mitchell*, 472 U.S. at 527).

These principles have obvious application here. When the Attorney General issues an incident-denying certification, the majority rule requires the district court to "resolve the factual dispute" about the merits of the case in order to grant or deny Westfall Act immunity. App. 8a; *accord* Proof Brief for Defendant-Appellant Barry Haley at 22 (arguing that "the district court had to address"—at the *immunity* stage—"whether Haley committed the acts alleged in the complaint"). Such a requirement cannot be squared with *Mitchell*'s and *Johnson*'s precepts that immunity is "a legal issue that can be decided with reference only to undisputed facts," that a court considering immunity "need not consider the correctness of the plaintiff's version of the facts," and that "immunity is conceptually distinct from the merits."

c. This Court returned to the relationship between an immunity defense and the merits of the plaintiff's claim in *Crawford-El v. Britton*, 523 U.S. 574 (1998). The Court distinguished between the "plaintiff's showing of improper intent (a pure issue of fact)" and "the separate qualified immunity question whether the official's alleged conduct violated clearly established law, which is an 'essentially legal question.'" *Id.* at 589 (quoting *Mitchell*, 472 U.S. at 526). Moreover, the Court observed that it "has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action." *Id.* (quoting *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). The Court also reiterated that in

order to resolve an immunity defense, a district court "must determine whether, *assuming the truth of the plaintiff's allegations*, the official's conduct violated clearly established law." *Id.* at 598 (emphasis added).

If, as the United States argues, Westfall Act immunity is "closely related" to qualified immunity, then it would be anomalous for district courts to determine the former without assuming the truth of the plaintiff's allegations, at least as to the existence of the very incident on which liability is premised. But by definition, incident-denying certifications do just that. Such certifications, moreover, necessarily entail an inquiry into "pure issue[s] of fact" that underlie the plaintiff's cause of action rather than the "essentially legal question[s]" that are the hallmark of immunity defenses.

Therefore, the Court should take up the first question presented and resolve the split over the Attorney General's authority under the Westfall Act to issue incident-denying certifications.

II. As the Court Below Also Acknowledged, the Circuits Are Split on Whether Westfall Act Actions May Be Remanded to State Court.

1. Having resolved the certification issue, the court below considered the remand issue: "Defendants additionally argue that even if the district court correctly denied the United States' motion to substitute, it erred in remanding the case to state court." App. 8a. The court of appeals observed that this position "attracted four of the five . . . justices joining the majority opinion in *Lamagno*." *Id.* In the Sixth Circuit's view, that four-Justice plurality concluded that "a district court retains jurisdiction under the Westfall Act even if [the court] ultimately refuses to substitute the United States as a defendant." *Id.*

Although *Lamagno* itself was a case originally filed in federal court under the diversity jurisdiction, the plurality nevertheless addressed the remand issue in Part IV of its opinion: it is "reasonable and proper for the federal forum

to proceed beyond the federal question to final judgment once it has invested time and resources on the initial scope-of-employment contest." 515 U.S. at 436. The four dissenting Justices, on the other hand, found "a serious problem . . . in requiring a federal district court, after rejecting the Attorney General's certification, to retain jurisdiction over a claim that does not implicate federal law in any way." *Id.* at 441 (Souter, J., dissenting). That is, retaining jurisdiction in these circumstances "invite[d] a difficult and wholly unnecessary constitutional adjudication about the limits of Article III jurisdiction." *Id.* at 443-44. Though otherwise joining the plurality to make a majority on the main issue, Justice O'Connor did not join Part IV of the plurality's opinion, splitting the Court four to four on the remand issue.

2. This split, as the court below described in detail, *see* App. 9a-10a, is mirrored in the courts of appeals. Largely based on § 2679(d)(2)'s final sentence—"This certification of the Attorney General shall *conclusively* establish scope of office or employment for purposes of removal" (emphasis added)—the Third, Fourth, and Fifth Circuits have ruled that a remand to state court is not authorized, regardless of how the district court decides the scope-of-employment question. *See Aliota v. Graham*, 984 F.2d 1350, 1356 (3d Cir.), *cert. denied*, 510 U.S. 817 (1993); *Borneman v. United States*, 213 F.3d 819, 826 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001); *Garcia v. United States*, 88 F.3d 318, 325 (5th Cir. 1996).

Pointing to an "analogous" (if not strictly applicable) provision of the Westfall Act—"If, in considering the [defendant employee's] petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court," § 2679(d)(3)—the First Circuit and the D.C. Circuit have ruled precisely the opposite. *See Nasuti v. Scannell*, 906 F.2d 802, 814 (1st Cir. 1990) ("If the district court finds that [the defendant employee] was acting *outside* the scope of his employment, it shall remand the

case back to the state superior court."); *Haddon v. United States*, 68 F.3d 1420, 1427 (D.C. Cir. 1995) (concluding that the Westfall Act "requires the district court to remand a Section (d)(2) case to state court, even though Section (d)(3) is the only provision that explicitly compels it to do so").

The Eleventh Circuit has taken yet another position—in the middle. In *Green v. Hill*, 954 F.2d 694 (11th Cir.), *on reh'g*, 968 F.2d 1098, 1098 (11th Cir. 1992), the action was sent back to the district court for a determination "whether the alleged assault and battery was work related." If that court determined that "the acts occurred outside the scope of employment"—that is, certification was improper—then it was "within the district court's discretion to continue its jurisdiction over the case and adjudicate the controversy"; alternatively, "the court "may elect to remand the assault and battery issue to the state court." *Id.* at 1098-99, *cited in Clamor v. Karagiorgis*, 191 F. Supp. 2d 1186, 1192 (D. Haw. 2002) ("This court need not determine whether it has the power to remand. It concludes only that it is not required to remand.").[3]

3. As noted above, the court below "agree[d] with the majority view that the clear language of the Act forecloses remand," such that "the district court lacked authority to remand the action." App. 10a. Also as above, there are good reasons to conclude that the Sixth Circuit came down on the wrong end of the three-way split.

a. The D.C. Circuit observed that remanding cases where the defendant employee is determined to have acted

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[3] For completeness' sake, we note that in *Clamor v. United States*, 240 F.3d 1215, 1218-19 (9th Cir. 2001), the Ninth Circuit acknowledged the split on the remand issue but chose to let the district court address the issue "in the first instance."

Having concluded that an incident-denying certification did not satisfy the Westfall Act, a district court in the Tenth Circuit remanded the action to state court. *See Jackson v. United States*, 751 F. Supp. 911 (D. Colo. 1990).

outside the scope of his federal employment is "consistent with [federal courts'] responsibility to construe statutes to avoid constitutional questions." *Haddon*, 68 F.3d at 1427 (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994)). That is, "[p]ermitting a federal court to retain a case after determining that no federal issue or diversity of citizenship exists would, as a majority of the Supreme Court recognized, potentially raise serious questions regarding Article III jurisdiction." *Id.* (citing *Lamagno*, 515 U.S. at 437 (O'Connor, J., concurring) (noting a "difficult question of federal jurisdiction"); *id.* at 441 (Souter, J., dissenting) (noting a "serious problem" that "approach[es] the limit [of Article III 'Arising Under' jurisdiction], if it does not cross the line"). But, reasoned the D.C. Circuit, "[r]equiring remand to state court avoids these constitutional questions, while in no way undermining the purposes of the Westfall Act." *Haddon*, 68 F.3d at 1427.

b. To these constitutional considerations one can add the point that Congress expressly intended the Westfall Act to strike a balance: "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." Westfall Act, § 2(b) ("Purpose"), 102 Stat. at 4564, *reprinted in* App. 27a. As the D.C. Circuit correctly observed, "[a]llowing federal courts to try garden-variety tort suits following a judicial determination that the federal employees acted *outside* the scope of employment would not serve Congress's [dual] objectives." *Haddon*, 68 F.3d at 1427. Moreover, as the First Circuit noted, "a remand is both more logical and efficient than a dismissal of the federal action." *Nasuti*, 906 F.2d at 814 n.17.

c. The foregoing decisions treated the remand issue in the context of certifications that were colorably authorized by the Westfall Act at the outset even if they were successfully challenged on later review in the district court. By

this we mean certifications that properly invoke the Act and properly remove cases to federal court, where the scope-of-employment question is subject to judicial review. In such a case, it could fairly be argued that although "[t]here may no longer be a federal question once the federal employee is resubstituted as defendant, . . . there *was* a nonfrivolous federal question . . . when the case was removed to federal court." *Lamagno*, 515 U.S. at 435 (plurality opinion). Thus, it could fairly be argued further that such a case "raises [a] question of substantive federal law at the very outset," and it therefore "clearly 'arises under' federal law, as that term is used in Art. III." *Id.* (quoting *Verlinden B.V.*, 461 U.S. at 493); *see also supra* pp. 9-10.

But consider a case where (as here) removal is predicated on an incident-denying certification. The only dispute for the district court to resolve is whether the incident did in fact occur, which is (by definition) a "pure issue of fact." *Crawford-El*, 523 U.S. at 589. In *Wood*, that factual issue was whether the defendant "spoke in a sexually suggestive manner to plaintiff" and also whether he did "proposition or otherwise make any sexual advances towards plaintiff." 995 F.2d at 1124. Here, the factual issue is whether "Haley influenced LBLA . . . to fire [petitioner] after she had a run-in with Haley." App. 3a. As discussed above, it is difficult to see how of any of these factual issues is a "nonfrivolous federal question," or a "question of substantive federal law," as those terms were used by the *Lamagno* plurality. Thus, unless this case and others of its kind are remanded to state court, Westfall Act litigation will indeed "cross the line" of Article III jurisdiction, as the *Lamagno* dissent warned.

d. Finally, we believe that it is instructive to consider the federal officer removal statute, 28 U.S.C. § 1442(a). As this Court reiterated in *Jefferson County v. Acker*, 527 U.S. 423 (1999), to qualify for removal under § 1442(a), the federal officer must "raise a colorable federal defense." *Id.* at 431 (citing *Mesa v. California*, 489 U.S. 121, 139 (1989)). In construing this requirement, the Court does "not require

the officer virtually to 'win his case before he can have it removed.'" *Id.* (quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)). In *Jefferson County* itself, the Court concluded that the defendant officers' intergovernmental tax immunity "argument, although we ultimately reject it, presents a colorable federal defense," *id.*, and therefore the Court held that "the case was *properly* removed under the federal officer removal statute," *id.* at 427 (emphasis added). In *Mesa*, by contrast, the removing defendants had "raise[d] no colorable claim of federal immunity or other federal defense," and so the Court affirmed a judgment remanding the case to state court. 489 U.S. at 124.

The Attorney General's Westfall Act certification that the defendant employee was acting within the scope of his employment is fairly analogized to the assertion of a colorable federal defense. The certification, like the federal defense, need not be "right"—in the sense of being resolved in the federal defendant's favor on subsequent judicial review—to make removal "proper." (This, petitioner, submits, is what 28 U.S.C. § 2679(d)(2) means in providing that a certification "shall *conclusively* establish scope of office or employment for purposes of removal").

On the other hand, just like a federal defense that is not even colorable, a certification that is not authorized by the Westfall Act—to wit, an incident-denying certification—cannot sustain removal. As in *Mesa*, such an action must be remanded to state court. The Court put it this way in a subsequent federal officer removal case:

> Having concluded that NIH *lacked authority to remove petitioners' suit to federal court*, we must determine whether the case should be remanded to state court. . . . Since the district court had no original jurisdiction over this case, . . . *a finding that removal was improper* deprives that court of subject matter jurisdiction and obliges a remand under the terms of [28 U.S.C.] § 1447(c).

International Primate Protection League v. Administrators of Tulane Educational Fund, 500 U.S. 72, 87 (1991) (unanimous) (emphasis added).

Therefore, the Court should also take up the second question presented and resolve the three-way split over the authority of a district courts to remand a Westfall Act case to state court upon concluding that the Attorney General's purported certification was not authorized by the Act.

III. This Case Is an Excellent Vehicle to Resolve the Long-Standing Splits in the Circuits.

1. The two circuit splits have existed for more than a decade. The split on the first question presented has existed since 1994, when the Third Circuit in *Melo* expressly disagreed with the First and Second Circuits in *Wood* and *McHugh*, respectively. *See supra* pp. 7-8. The split on the second question has existed even longer, with the First Circuit *ordering* remand to state court in 1990, followed by the Eleventh Circuit giving district courts *discretion* to remand in 1992. *See supra* pp. 13-14. The split between the four-Justice plurality and the four-Justice dissent in *Lamagno* has persisted since 1995. As this case illustrates, moreover, the two questions are recurring ones. *See also, e.g., Asto v. Mirandona*, 372 F. Supp. 2d 702, 707 (E.D.N.Y. 2005) ("The court must view the tortious conduct in the light most favorable to plaintiff, meaning that 'the government may not deny that acts were within the scope of employment by denying that the acts occurred.'" (quoting *McHugh*, 966 F.2d at 74)); *Allstate Insurance*, 254 F. Supp. 2d at 718-28 (S.D. Ohio 2002) (addressing the remand issue at great length); *Clamor*, 191 F. Supp. 2d at 1189-93 (D. Haw. 2002) (same).

2. The present case is an ideal vehicle to resolve the recurring questions. In the first place, it cleanly presents both questions. More importantly, the scope-of-employment issue is presented in its simplest and starkest form. There are no factual or legal disputes about immunity per se: the United States "conceded that if Haley induced [petitioner's]

firing, he acted outside the scope of his employment" with the U.S. Forest Service. App. 3a. Accordingly, the present case does not raise what the First Circuit in *Wood* called a potential "administrative problem" that can arise when the court confronts "the difference between denying facts that amount to a 'characterization' or 'description'" (which *Wood* permits the Attorney General to do) and "denying that any harm-causing incident occurred at all" (which is foreclosed by *Wood*). 995 F.2d at 1129-30.

This case provides the Court with a good opportunity to dispel the considerable "statutory fog" that has attended the Westfall Act for a great while. The Court should take that opportunity.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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November 2005

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 05a0381p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAT OSBORN, *Plaintiff-Appellee,* v. BARRY HALEY, *Defendant-Appellant (04-5716),* GAYE LUBER; LAND BETWEEN THE LAKES ASSOCIATION, INC., a Kentucky Corporate Contractor to the U.S. Forest Service, *Defendants-Appellants (04-5820).*	Nos. 04-5716/5820

Appeal from the United States District Court
for the Western District of Kentucky at Paducah.
No. 03-00192—Thomas B. Russell, District Judge

Submitted: June 1, 2005

Decided and Filed: September 8, 2005

Before: MOORE and COOK, Circuit Judges;
GWIN, District Judge.*

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* The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

COUNSEL

ON BRIEF: Peter R. Maier, Barbara L. Herwig, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., C. Thomas Miller, J. Duncan Pitchford, WHITLOW, ROBERTS, HOUSTON & STRAUB, Paducah, Kentucky, for Appellants. Pat Osborn, Murray, Kentucky, pro se.

OPINION

COOK, Circuit Judge. This decision confronts the procedural ramifications attendant to a Westfall Act certification that denies the occurrence of any injury-causing event and the jurisdictional consequences of a denial of substitution under the Act—issues that have split the circuits. We vacate the district court decision, ascribing instead to the view adopted by a majority of the other circuits to have considered these issues.

I

The Westfall Act, 28 U.S.C. § 2679, immunizes federal employees from liability for torts committed within the scope of their employment. The Act permits the United States to certify that a federal employee acted within the scope of his employment, remove such state-court action to federal court, and substitute itself as defendant in place of the targeted federal employee:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed . . . by the Attorney General to the district court of the United States . . . Such action or proceeding shall be

> deemed to be an action or proceeding brought against the United States . . . , and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

28 U.S.C. § 2679(d)(2) (2000).

The United States invoked its Westfall-Act authority in this case on behalf of Barry Haley, an employee of the Forest Service. Plaintiff Pat Osborn sued Haley in state court following her termination by her employer, Land Between the Lakes Association (LBLA). Osborne complained that Haley influenced LBLA, a contractor that provided services to the Forest Service, to fire her after she had a run-in with Haley. The Attorney General authorized certification that Haley had been acting within the scope of his employment at the time of the incident giving rise to Osborn's allegations. The United States then successfully removed the suit to federal court and filed a Notice of Proposed Substitution for the immune Haley, and a motion to dismiss for failure to state a claim.

In the district court, Osborn contested substitution, adamant that, notwithstanding the Attorney General's certification, Osborn's inducement of her discharge was extraneous to the proper scope of his duties. To prove her point, she submitted evidence that governing policies prohibited Forest Service employees like Haley from "participat[ing] in any LBLA decision concerning the relationship of the LBLA to the Forest Service, including but not limited to . . . hiring or firing LBLA employees." In response, the United States conceded that if Haley induced Osborn's firing, he acted outside the scope of his employment. It denied, however, that Haley interfered with Osborn's continued employment.

The district court regarded the submissions of the parties as requiring a decision on the merits of Osborn's claim, *i.e.*, whether the alleged harm-causing incident occurred at

all, rather than consideration of the question it thought it should be reviewing—whether the *content* of the communications between LBLA and Haley was within his scope of employment. The district court thus decided it lacked authority to decide the scope question. It instead accepted as true Osborn's allegations that Haley induced her discharge, and from that premise resolved the scope-of-employment/immunity issue against Haley's entitlement to immunity. The court perforce denied substitution and, then, concluding that it lacked jurisdiction, remanded the action to state court.

II

We analyze Defendants' appeal as presenting two interpretive questions yet unanswered by existing circuit precedent: first, whether district courts evaluating a scope certification can resolve material disputes about the facts "upon which the plaintiff would predicate liability," or whether instead courts must accept the plaintiff's allegations of such "merits facts," *Melo v. Hafer*, 13 F.3d 736, 742-43 (3d Cir. 1994); and second, whether a federal court possesses the authority to remand if it ultimately finds substitution of the United States inappropriate. We begin with the first of the two questions.

A

It is well settled that the Attorney General's scope-of-employment certification may be judicially reviewed—a plaintiff may challenge the scope certification and expect resolution of that issue by the district court. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995). But, as the district court rightly acknowledged in choosing the sister-circuit precedent it would follow, circuits disagree about the parameters of district courts' factfinding authority where, as here, the Attorney General's scope certification amounts to a denial that any wrongdoing occurred. In such cases, adjudicating the precondition—whether the incident occurred within the scope of employment—can only be accom-

plished by deciding whether the employee committed the wrong the plaintiff alleges. And that prospect has caused courts to question their authority under such circumstances.

Wood v. United States, 995 F.2d 1122 (1st Cir. 1993) (en banc), the First Circuit decision relied on by the district court, represents one approach to this certification scenario. The *Wood* majority took the position that the Westfall Act does not permit judicial factfinding where the Attorney General's certification essentially denies the plaintiff's central allegations of wrongdoing, but instead requires courts to accept as true the plaintiff's allegations (as the district court did here). The court acknowledged that the Act permits the Attorney General to dispute the plaintiff's *description* of the tortious incident alleged—"incident-characterizing facts"—and authorizes the district court to resolve such disputes. *Id.* at 1129. But, according to the court, "incident-denying" certifications require different treatment, largely because the Act's reference to the "time of the incident out of which the claim arose" assumes the existence of some kind of incident. *Id.* at 1124. Additionally, the court deemed restrictions on the court's factfinding authority in connection with incident-denying certifications necessary to preserve the jury's factfinding role. *Id.* at 1123, 1130.

Three judges dissented, insisting "the district court cannot proceed merely by assuming the complaint's allegations to be true and the certificate false." *Id.* at 1134. To the contrary, in their view, district courts must resolve all factual disputes relevant to whether the defendant acted within the scope of employment, including, when necessary, whether the defendant acted as the plaintiff alleges. *Id.* at 1133. The *Wood* dissenters discounted the en banc majority's interpretation of the statutory phrasing as necessarily assuming that an incident occurred. To them, "it is an accident of language—a reflection of the most common case—that the statute posits a 'happening.'" *Id.* at 1134. "Incident," they determined, "must encompass the possibility that something did not happen as well as the possibility

that it did." *Id.* Acknowledging some doubt regarding whether the jury or the judge should decide issues "common both to the validity of the certificate and to the merits of the controversy," the dissenters nonetheless concluded that the statutory language, Congress's policies, and relevant precedent support leaving that decision to the judge. *Id.* at 1134-37. The dissenting view found support in: the absence of language in the statute requiring the Attorney General or the court to accept the plaintiff's version of events; Congress's intent to spare employees for whom the Attorney General has issued a scope certification "not only from liability for misconduct related to their official duties but also from the burden and expense of defending such suits"; and Supreme Court precedent emphasizing that "immunity-related issues should be decided by the judge and at the earliest opportunity." *Id.* at 1135-36 (emphasis omitted). Additionally, from the standpoint of sound administration of the statute, the dissenters found untenable the majority's distinction between *characterization* of an incident and *denial* of an incident. The dissenters predicted that, "under the majority's approach, district courts—and ultimately [circuit courts]—will continue to engage in difficult, time-wasting controversies . . . about precisely *which facts* pertaining to the scope of employment issue are for the district judge and which are for the jury," resulting in the multiplication of "[h]air splitting distinctions and anomalous results." *Id.* at 1136.

The majority of circuit courts addressing the issue since *Wood* have adopted the dissenters' approach. In *Kimbro v. Velten*, 30 F.3d 1501, 1508 (D.C. Cir. 1994), for example, the D.C. Circuit, echoing the dissenters' reasoning, concluded: "it does not matter . . . what the certification actually says —*i.e.*, whether it denies or recharacterizes the plaintiff's allegations of the employee defendant's conduct; its filing simply ensures that a federal court determine whether the employee is entitled to absolute immunity." Comparing the Attorney-General-certification provision with another provision of the Westfall Act, § 2679(d)(3), which entitles a de-

fendant to a scope determination even absent an Attorney General's scope certification, the court reasoned, "Congress certainly could not possibly have intended an employee, whose conduct the Attorney General declined to certify, to have greater immunity protection than one who enjoyed an Attorney General's certification." *Id.*

Likewise, in *Melo v. Hafer*, the Third Circuit, after reviewing the legislative history and language of the statute and considering *Wood*, "respectfully disagree[d] with the *Wood* court." 13 F.3d at 746. The *Melo* court found "nothing in the text or legislative history of the Act suggesting that Congress intended to restrict district courts to the facts alleged in the plaintiff's complaint when deciding substitution motions." *Id.* The court found "[a] fortiori, . . . nothing there suggesting that district courts be limited to the 'core' facts alleged but not the 'descriptive' ones." *Id.* Moreover, given congressional approval of pre-Westfall Act summary-judgment practice—reflected in the legislative history—the court "decline[d] to attribute to Congress an intent to make pre-trial substitution less available to a defendant employee than was a summary judgment on grounds of immunity under pre-Westfall practice." *Id.* The court thus concluded "that the Attorney General may file a certification under [the Westfall Act] whenever he or she concludes that an employee defendant was acting within the scope of his or her employment at the relevant time or times," even if "the plaintiff alleges conduct which is beyond the scope of the defendant's employment, but which the Attorney General determines did not occur." *Id.* at 747.

Other decisions too expressly or impliedly reject the *Wood* majority's approach. *See Heuton v. Anderson*, 75 F.3d 357, 360 (8th Cir. 1996) (finding the *Wood* majority's approach "contrary to the language of the Westfall Act," and agreeing with the *Wood* dissenters that "nothing in the Westfall Act gives the district court the authority to refuse to substitute the United States on the ground that either the government or the employee denies the offensive conduct").

Though this court has not yet directly addressed this issue, it noted in *Singleton v. United States* that "when a district court is reviewing a certification question under the Westfall Act, it must identify and resolve disputed issues of fact necessary to its decision before entering its order." 277 F.3d 864, 870 (6th Cir. 2002) (internal quotations and citations omitted). The panel cited *Heuton*, *Melo*, and *Kimbro* for this proposition.

We join the majority of the circuits addressing the issue in holding that where the Attorney General's certification "is based on a different understanding of the facts than is reflected in the complaint," *Melo*, 13 F.3d at 747, including a denial of the harm-causing incident, the district court must resolve the factual dispute. In our view, this reading of the Westfall Act observes the language and purpose of the Act, effectuates congressional policy, and accounts for administrative practicalities. We thus conclude that the district court erred in relying on the First Circuit's decision in *Wood* and in denying substitution without first determining the scope-of-employment issue.

B

Defendants additionally argue that even if the district court correctly denied the United States' motion to substitute, it erred in remanding the case to state court. Again pointing to a circuit split, Defendants urge us to adopt the majority view and interpret the Westfall Act as requiring the exercise of federal jurisdiction upon Attorney General certification, even where the district court ultimately denies substitution.

The Westfall Act provides that "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. § 2679(d)(2). In a footnote, our *Singleton* case suggested that the "conclusively" language should be read literally. The panel noted:

> [A] plaintiff suing a federal employee may not challenge the government's removal of the case to federal court, but, once in federal court, the plaintiff may challenge the government's substitution of itself as defendant. . . . If the district court finds that the federal employee was not acting in the scope of employment and therefore that substitution is inappropriate, the district court retains jurisdiction over the case and assesses the claims pursuant to state tort law.

277 F.3d at 870 n 5. *See also Wolverton v. United States*, No. 96-5224, 1997 WL 85153, at *2 (6th Cir. Feb. 26, 1997) ("Unlike a certification for removal . . . a certification for substitution . . . is not automatically conclusive.").

This interpretation attracted four of the five Supreme Court justices joining the majority opinion in *Lamagno*. In concluding that a district court retains jurisdiction under the Westfall Act even if it ultimately refuses to substitute the United States as a defendant, those justices reasoned: "Whether the employee was acting within the scope of his federal employment is a significant federal question—and the Westfall Act was designed to assure that this question could be aired in a federal forum. . . . Because a case under the Westfall Act thus raises a question of substantive federal law at the very outset, it clearly arises under federal law, as that term is used in Art. III." 515 U.S. at 435 (internal quotations, alterations, and citations omitted).[1]

Several circuit court opinions agree with the four-justice *Lamagno* interpretation. *See, e.g., Borneman v. United States*, 213 F.3d 819, 826 (4th Cir. 2000) ("Because § 2679(d) 'conclusively' vests federal jurisdiction over a suit against a federal employee who the Attorney General has

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[1] Justice O'Connor expressed no opinion on the issue, but, objecting to the court's resolution of an issue not presented in the case before it, declined to join the majority opinion on this point. 515 U.S. at 437 (O'Connor, J., concurring).

certified 'was acting within the scope of his office or employment,' a district court has no authority to remand a case removed pursuant to that section, and the bar of § 1447(d) does not preclude us from reviewing a remand order when the district court exceeds its authority."); *Garcia v. United States*, 88 F.3d 318, 325 (5th Cir. 1996) (analyzing the language of the statute, the opinions in *Lamagno*, and decisions in other circuits and concluding that "upon rejection of the Attorney General's certification, the district court retains jurisdiction and may not remand the action to state court"); *Aliota v. Graham*, 984 F.2d 1350, 1356 (3d Cir. 1993) ("From [the Westfall Act's] statutory scheme, we conclude that when a tort suit against a federal employee is filed in state court and the Attorney General certifies that the employee was acting within the scope of the employee's office or employment and removes the case, the district court has no authority to remand the case on the ground that the Attorney General's certification was erroneous. We believe that this conclusion is dictated by the plain language of the [Westfall Act] stating that the Attorney General's certification 'shall *conclusively* establish scope of office or employment *for purposes of removal*.' "). *But see Haddon v. United States*, 68 F.3d 1420, 1427 (D.C. Cir. 1995) (requiring remand where the federal court finds the Attorney General's certification erroneous, reasoning that such a conclusion avoids difficult constitutional questions without undermining the purposes of the Westfall Act and prevents "federal courts [from trying] garden-variety tort suits following a judicial determination that the federal employees acted *outside* the scope of employment"); *Nasuti v. Scannell*, 906 F.2d 802, 814 n.17 (1st Cir. 1990) ("We imply power to enter a remand order (should scope not be found) from the analogous authorization in section 2679(d)(3), and from the fact that a remand is both more logical and efficient than a dismissal of the federal action.").

We agree with the majority view that the clear language of the Act forecloses remand. We thus also agree with Defendants that the district court lacked authority to remand the action.

III

Finding Defendants' arguments well taken, we vacate the district court's denial-of-substitution and remand orders. On remand the district court shall resolve the factual disputes underlying the scope question, including whether the alleged incident occurred. Even if the district court finds that Haley acted outside the scope of his employment, it must nonetheless retain jurisdiction over this case.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CASE NO. 5:03CV-192-R

PAT OSBORN,

PLAINTIFF

v.

BARRY HALEY, et al.

DEFENDANTS

ORDER

This matter is before the Court on the United States's motion for reconsideration (Dkt #22). Motions to reconsider under Fed. R. Civ. P. 59(e) are granted "if there is a clear error of law, see *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998); newly discovered evidence, see *id.*, an intervening change in controlling law, *Collision v. International Chemical Workers Union, Local 217*, 34 F.3d 233, 236 (4th Cir. 1994); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 90-91 n.3 (1st Cir. 1993); *School District No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993), or to prevent manifest injustice. *Davis v. Jellico Community Hospital*, 912 F.2d 129, 133 (6th Cir. 1990); *Collision*, 34 F.3d, at 236; *Hayes*, 8 F.3d, at 90-91 n.3." *Gencorp, Inc. v. American International Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). "A motion under Rule 59(e) is not an opportunity to re-argue a case," and the movant must "clearly establish a manifest error of law or must present newly discovered evidence." *Sault Ste. Marie Tribe*, 146 F.3d, at 374 (citing *FDIC v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992)). Parties are not to use them to raise

arguments which could, and should, have been made before judgment issued." *Id.* Finally, to "constitute 'newly discovered evidence,' the evidence must have been previously unavailable." *Gencorp*, 178 F.3d, at 384 (citing *ACandS*, 5 F.3d, at 1263; *Javetz v. Board of Control, Grand Valley State University*, 903 F. Supp. 1181, 1191 (W.D. Mich. 1995) (and cases cited therein); Charles A. Wright, 11 Federal Practice and Procedure § 2810.1, at 127-28 (1995)). *See also Global Network Technologies, Inc. v. Regional Airport Authority of Louisville and Jefferson County*, 122 F.3d 661, 665-66 (8th Cir. 1997) ("a Rule 59(e) motion may not be used to introduce new evidence that could have been introduced during the pendency of the summary judgment motion").

The United States has presented new evidence (albeit evidence previously available) in the form of declarations from Mr. Haley and Ms. (Luber) Gieselman, but has not pointed to any change in controlling Sixth Circuit law—or the creation thereof. Its motion rests mainly on the contention that this Court committed a clear error of law in its original disposition of the case. *See Engler, supra.* This clear error is based on this Court's decision to overrule the Attorney General's certification that Mr. Haley acted within the scope of his employment if and when he took actions alleged in Ms. Osborn's complaint, or, in the alternative, on this Court's failure to hold an evidentiary hearing to determine whether Mr. Haley in fact took those actions.

The question now, as before, is how this Court is to settle the dispute between Ms. Osborn on one hand, and Mr. Haley and Ms. Gieselman on the other, about to what extent, if any, Ms. Osborn's complaint to the Department of Labor played a role in her dismissal. Mr. Haley and Ms. Gieselman assert that it played no role at all because Ms. Gieselman did not know about it and she and Mr. Haley did not discuss it.

One complicating factor is that Mr. Haley has signed a declaration stating that he had no communication with

Ms. Gieselman regarding the decision to fire Ms. Osborn. Therefore, it is highly unlikely, this Court would assume, that facts could develop during any type of discovery that would demonstrate that Mr. Haley "interacted" with Ms. Gieselman "regarding [Ms. Osborn's employment and] and any job-related problems that could have contributed to Ms. Osborn's firing." Mr. Haley has made legal arguments in the alternative hoping to preserve the United States's certification. This Court will not credit, however, factual arguments made in the alternative when one version is made under oath subject to perjury, i.e., Mr. Haley's declaration, and the other version merely suggested. Therefore, this Court must assume that the discovery would ultimately force it to decide between the basic question of whether the communication between Mr. Haley and Ms. Gieselman occurred or not, and whether it impacted Ms. Gieselman's decision to fire Ms. Osborn, and not about whether the content of the communication was within the scope of Mr. Haley's employment.

There is a dispute among the circuits—which the Sixth Circuit has not yet addressed—about how courts should deal with Westfall Act certifications based on an argument that no harm-causing incident ever took place. The First Circuit, in *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993), per then-Chief Judge (now Justice) Breyer, reviewed federal employee immunity from common law torts, the Westfall Act's text, and its legislative history, and found that "the [Attorney General's certification] cannot deny the occurrence of the basic incident charged." *Id.* at 1124. The First Circuit concluded that permitting "a Westfall Act certificate simply to deny that anything occurred would extend a form of this immunity well outside the 'respondeat superior' context to 'egregious' torts allegedly committed at work. It would permit, to a significant degree, the Attorney General and district judge (rather than the jury) to decide whether allegations of such non-work-related torts were true or false." *Id.* at 1128.

The D.C. Circuit, in *Kimbro v. Velten*, 30 F.3d 1501 (C.A.D.C. 1994), disagreed with the First Circuit's conclusion. In *Kimbro*, the D.C. Circuit faced a lawsuit by one employee of the Department of Veteran Affairs against another employee for assault and battery. The victim, Ms. Kimbro, alleged that her fellow employee had "viciously struck [her] on the right arm" and assaulted her to prevent her from making a copy of her assailant's time card. *Id.* at 1502. The district court "did not decide whether [the assailant] had been acting within the scope of employment (or whether an assault had, in fact, occurred). Instead, the [district] court reasoned that if the assault had occurred, it could not be within the scope of employment, and if the assault did not occur (of course), no tort took place. Under either scenario, the FTCA was not implicated." *Id.* The D.C. Circuit rejected the First Circuit's analysis in *Wood* (and the district court's reasoning in the decision on appeal) and concluded that the district courts must, if necessary, resolve the merits of the underlying dispute, i.e., whether or not the harm-causing incident took place, even if doing so ousts Ms. Osborn's right to a trial by jury. *Id.* at 1508-10.[1] *See also generally Melo v. Hafer*, 13 F.3d 736 (3d Cir. 1994) (adopting the approach advocated by the dissenters in *Wood* and by *Kimbro*).

This Court concludes that the *Wood* majority has the better of the interpretive dispute surrounding Westfall Act certifications, and that in any event the United States has not demonstrated that this Court's earlier opinion committed a "clear error of law." Therefore, the United States's motion to reconsider is **DENIED**. The United States's motion to stay remand of the case is **DENIED AS MOOT**.

---

[1] The *Kimbro* court addresses plaintiffs' Seventh Amendment rights by noting "that under this statute Kimbro's claim is deemed an action against the United States—unless and until she establishes that Velten was acting outside her scope of employment—and the Seventh Amendment does not apply to actions against the United States." 30 F.3d at 1509 n.4.

IT IS SO ORDERED.

This is the 13 day of May, 2004.

/s/ Thomas B. Russell
Thomas B. Russell, Judge
United States District Court

cc: counsel

ENTERED

MAY 13 2004

JEFFREY A. APPERSON, CLERK
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DEPUTY CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CASE NO. 5:03CV-192-R

PAT OSBORN,

PLAINTIFF

v.

BARRY HALEY, GAYLE LUBER,
and LAND BETWEEN THE LAKES
ASSOC., INC.

DEFENDANTS

ORDER

For the reasons given in the accompanying opinion, this Court finds that Mr. Haley's alleged actions occurred outside the scope of his employment with the United States Forest Service. In light of this conclusion, **IT IS ORDERED** that

the United States's motion to dismiss (Dkt #13) is **DENIED**;

the United States's declaration of substitution and/or certification is **OVERRULED**;

Mr. Barry Haley shall continue to be a party defendant in his individual capacity; and

this case is **REMANDED** to Trigg County Circuit Court.

This is the 10 day of March, 2004.

/s/ Thomas B. Russell
Thomas B. Russell, Judge
United States District Court

cc: counsel

ENTERED

MAR 12 2004

JEFFREY A. APPERSON, CLERK
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DEPUTY CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CASE NO. 5:03CV-192-R

PAT OSBORN,

PLAINTIFF

v.

BARRY HALEY, GAYLE LUBER,
and LAND BETWEEN THE LAKES
ASSOC., INC.

DEFENDANTS

MEMORANDUM AND ORDER

The United States has moved to intervene in this case and substitute itself as the party-in-interest for Mr. Barry Haley, a United States Forest Service employee originally sued in his individual capacity (Dkt #11). The United States subsequently moved to dismiss this case (Dkt #13) on the grounds that Ms. Osborn has failed to exhaust her administrative remedies under the Federal Tort Claims Act and that as a result the United States as sovereign has not acquiesced to this suit. Ms. Osborn has responded (Dkt #15) and the United States replied (Dkt #17), and the matter is now ripe for decision.

The United States's motion to dismiss hinges on the appropriateness of its motion to substitute itself for Mr. Haley. If the United States is the appropriate party, then the case must be dismissed. If the United States's attempted substitution is improper, then there is no cause for dismissal. For the reasons given below, this Court concludes

that the United States is not a proper party to this action and therefore its notice of substitution and certification (Dkt #11) is **OVERRULED** and its motion to dismiss (Dkt #13) is **DENIED**. This Court shall treat Ms. Osborn's response as in part a motion to return Mr. Haley, in his individual capacity, as a party to this matter; that motion is **GRANTED**.

Finally, the absence of the United States as a party to this case destroys this Court's jurisdiction. Therefore, this Court may not consider LBLA and Ms. Luber's motion to dismiss, and this case must be returned to state court.

BACKGROUND

Ms. Osborn worked for a private company, Land Between the Lake Association, as a volunteer coordinator between January 2001 and June 2002. While employed by LBLA, Ms. Osborn applied for a job with the Forest Service. Ms. Osborn, who is entitled to a five-point veteran-hiring preference, did not receive the job. Mr. Haley was the Forest Service employee who was apparently in charge of the hiring process.

When Mr. Haley announced that he had given the job to someone else at a meeting with LBLA employees on May 20, 2002, Ms. Osborn questioned his failure to inform her before the meeting started, and subsequently made a joke at his expense about the use of a suggestion box system. During the next week Ms. Osborn's supervisor, Ms. Newkum, told her to apologize to Mr. Haley, but Ms. Osborn refused.

On June 11, Ms. Osborn then filed a complaint with the United States Department of Labor asking that it investigate whether or not she received appropriate consideration for her veterans' preference. The Department's investigator, Robert Kuenzli, spoke with Mr. Haley on June 17 and concluded after reviewing the hiring procedure that "the posting was handled correctly." Mr. Kuenzli informed Ms. Osborn of this, who then asked that he close her complaint.

On June 17, after Mr. Haley spoke with Mr. Kuenzli, the LBLA's executive director—Gayle Luber—demanded that Ms. Osborn apologize to Mr. Haley. Ms. Osborn refused, and was fired from the LBLA on June 19.

Ms. Osborn filed a complaint in state court alleging four causes of action: 1) discharge in violation of public policy [against LBLA and Gayle Luber]; 2) interference with employment relationship [against Mr. Haley]; conspiracy for wrongful discharge [against all the defendants]; and 4) conspiracy to interfere with an employment relationship [against all the defendants].

ANALYSIS

1. Is the United States a proper party to this case?

This Court must review the United States's certification that the alleged torts occurred within the scope of Mr. Haley's employment, although that certification is entitled to substantial deference. *See, e.g., Gutierrez de Martinez v. Lamagno,* 515 U.S. 417 (1995). Scope of employment questions are determined by state law. *Williams v. United States,* 350 U.S. 857 (1955); *see also Flechsig v. United States,* 991 F.2d 300, 302 (6th Cir. 1993). As a sister district court explained:

> When challenging a certification decision, a plaintiff must present evidence from which a District Court reasonably could find that the original defendant-employee acted outside the scope of his employment. As noted above, certification serves as prima facie evidence that an employee acted within the scope of his employment. Therefore, if the United States substitutes itself as the defendant and moves to dismiss, a plaintiff cannot defeat the motion merely by relying upon the factual allegations in his complaint. A plaintiff may defeat a motion to dismiss, however, by providing the District Court with evidence that raises

> a genuine issue of material fact on the scope-of-employment issue.

Gilbar v. United States, 108 F. Supp. 2d 812, 816-17 (S.D. Ohio 1999).

Here, however, the United States does not deny any of the factual allegations contained in Ms. Osborn's complaint, i.e., that Mr. Haley talked with Ms. Luber regarding Ms. Osborn's complaint to the Department of Labor. Instead, the United States only disputes her legal conclusion that Mr. Haley was acting in his individual capacity during the relevant times. *See* Dkt #11 at ¶ 2, 4.[1] Thus, an evidentiary hearing is not needed. *See Rutkofske v. Norman,* 114 F.3d 1188, 1997 WL 299382 at *4 (6th Cir. June 4, 1997) ("The other courts that have addressed the issue have also concluded that a factual hearing concerning removal under the Westfall Act is necessary only if there is conflicting evidence as to a material fact.").

Here, Ms. Osborn submitted with her response to the United States's motion to dismiss two additional pieces of evidence supporting her argument that Mr. Haley acted outside the scope of his employment. The first evidence was a memorandum of understanding between the Forest Service and LBLA. The second piece of evidence was a letter from the Department of Labor's investigator detailing his involvement with this matter.

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[1] The two instances are:

> Plaintiff alleges that Barry Haley was employed by the United States Forest Service "at all times relevant to this complaint . . . ." Complaint at paragraph 6. (Dkt #11 at ¶ 2)

> Monica Wheatley, Acting United States Attorney for the Western District of Kentucky, United States Department of Justice, certified that at the time of the conduct alleged, the individually named defendant was acting within the scope of his employment as an officer and/or agent of the United States Forest Service. (Dkt #11 at ¶ 4)

Ms. Osborn has alleged that the defendants committed four intentional torts. Ordinarily, under Kentucky law, intentional torts fall outside the scope of a person's employment unless they are undertaken with a "purpose to serve the employer." *See, e.g., American General Life & Accident Ins. Co. v. Hall*, 74 S.W.3d 688, 692 (Ky. 2003). Under Kentucky law, this Court must ask four questions to determine whether or not Mr. Haley acted within the scope of his employment. First, is the conduct similar to Mr. Haley's ordinary course of duties? Second, did Mr. Haley's actions occur within the "spacial and temporal limits" of his work? Third, were these actions taken to further the Forest Service's goals? And fourth, was the conduct foreseeable? *See Booker v. GTE.net LLC*, 350 F.3d 515, 518-19 (6th Cir. 2003).

Mr. Haley's alleged conduct, if proven true,[2] does not fall within the scope of his employment with the Forest Service. First, the Memorandum of Understanding between the Forest Service and LBLA clearly states that USFS employees will not participate in the "hiring or firing [of] LBLA employees." Therefore, any interaction Mr. Haley might have had regarding Ms. Osborn's employment was out of the scope of his duties with the Forest Service. Second, there is no indication—or even argument—that any of Mr. Haley's actions, if proven, furthered the Forest Service's goals. Third, there is no indication that this conduct should have been a foreseeable result of Mr. Haley's employment, Forest Service policies, or Ms. Osborn's actions.

Mr. Haley argues that Ms. Osborn has "alleged no facts to support an inference that Haley even attempted to affect her employment." This argument is more appropriate for a motion to dismiss than it is for any discussion of certification. And, in light of liberal pleading standards, it is not persuasive. Under Kentucky law, the close proximity be-

---

[2] It is important to note that Ms. Osborn need not provide additional proof of an undisputed fact absent any challenge to those facts by the United States.

tween Ms. Osborn's request that the Department of Labor investigate her job application, Mr. Kuenzli's call to Mr. Haley, and Ms. Luber's subsequent demand for apologies is enough to raise that inference. *See, e.g., Kentucky Dept. of Corrections v. McCullough*, 123 S.W.3d 130, 135-36 (Ky. 2003) ("Circumstantial evidence of a causal connection is 'evidence sufficient to raise the inference that [the] protected activity was the likely reason for the adverse action' " and "a close temporal proximity alone may be sufficient to raise the inference.") (citations omitted).

Ms. Osborn has adequately alleged conduct on Mr. Haley's part that, if proven, would give rise to tort claims under Kentucky state law and that fall outside the scope of his employment with the United States Forest Service. At this stage, this Court must accept her allegations as true absent argument otherwise. Therefore, it concludes that Mr. Haley's alleged actions occurred outside the scope of his employment with the United States Forest Service and that the Untied States's certification is inappropriate and its motion to dismiss should be denied.

2. Does this Court have jurisdiction?

Having concluded that the United States is not a proper party to this case, this Court must now determine whether or not it has jurisdiction. The Sixth Circuit has not spoken to this issue and the authority among other circuits is split. *See Allstate Ins. Co. v. Quick*, 254 F. Supp. 2d 706, 718-28 (S.D. Ohio 2002). After conducting a thorough analysis of the relevant statutes and caselaw, Chief Judge Rice in *Allstate* concluded that "28 U.S.C. § 2679(d)(2) does not bar this Court from remanding an intentional tort action against a federal employee after it has been determined that the employee was not acting within the scope of her employment." *Id.* at 729. This Court agrees with Judge Rice's conclusion and adopts the reasoning set forth in *Allstate* that "remand is authorized by the general remand statute, [28 U.S.C.] § 1447(c), which states, in part: 'If at any time be-

fore final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.'" *Id.* at 725. This conclusion is consistent with this Court's general authority to only hear cases where it has jurisdiction based on diversity or subject matter. Because the United States is not before this Court, and federal laws are not at issue, there is no subject matter [sic] jurisdiction. Because all the parties are citizens of Kentucky, there is no diversity jurisdiction. Therefore, this Court has no jurisdiction over this case and it must be remanded to the Trigg County Circuit Court.

An appropriate order shall follow.

This is the 10 day of March, 2004.

/s/ Thomas B. Russell
Thomas B. Russell, Judge
United States District Court

cc: counsel
United States Attorney
Ms. Osborn

ENTERED

MAR 12 2004

JEFFREY A. APPERSON, CLERK
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APPENDIX E

[102 Stat. 4563]

PUBLIC LAW 100-694—NOV. 18, 1988

Public Law 100-694
100th Congress
[H.R. 4612]

An Act

To amend title 28, United States Code, to provide for an exclusive remedy against the United States for suits based upon certain negligent or wrongful acts or omissions of United States employees committed within the scope of their employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Employees Liability Reform and Tort Compensation Act of 1988".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds and declares the following:

(1) For more than 40 years the Federal Tort Claims Act has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in *Westfall v. Erwin*, have seriously eroded the common law tort immunity previously available to Federal employees.

(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

(7) In its opinion in *Westfall v. Erwin*, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

[102 Stat. 4564]

(b) PURPOSE.—It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.

* * * *

SEC. 4. RETENTION OF DEFENSES.

Section 2674 of title 28, United States Code, is amended by adding at the end of the section the following new paragraph:

"With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.".

SEC. 5. EXCLUSIVENESS OF REMEDY.

Section 2679(b) of title 28, United States Code, is amended to read as follows:

"(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

"(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

"(A) which is brought for a violation of the Constitution of the United States, or

"(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.".

SEC. 6. REPRESENTATION AND REMOVAL.

Section 2679(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

"(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment **[102 Stat. 4565]** at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

"(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the

United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

"(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

"(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

"(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

"(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.".

SEC. 7. SEVERABILITY.

If any provision of this Act or the amendments made by this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and such amendments and the application of the provision to any other person or circumstance shall not be affected by that invalidation.

* * * *

FILED
FEB 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-593

In the Supreme Court of the United States

PAT OSBORN, PETITIONER

v.

BARRY HALEY; ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT BARRY HALEY

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

BARBARA HERWIG
MARK W. PENNAK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Attorney General's decision under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679(d), to certify that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose" (thus permitting the substitution of the United States for the employee as the defendant and the removal of the case to federal court) must accept the truth of the plaintiff's allegations.

2. Whether the Westfall Act's provision that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal" of the suit from state court, 28 U.S.C. 2679(d)(2), establishes that a district court is to retain jurisdiction over the removed suit, even if the court ultimately overturns the Attorney General's scope-of-employment certification for purposes of substituting the United States as the defendant.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT BARRY HALEY

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 422 F.3d 359. The memorandum and order of the district court denying the motions for substitution and dismissal filed by the United States (Pet. App. 17a-25a) and the opinion and order denying reconsideration of that order (Pet. App. 12a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered September 8, 2005. The petition for a writ of certiorari was filed November 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563 to override legislatively this Court's decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988). In *Westfall*, the Court held that, in order to obtain personal immunity from suit on tort claims, a federal employee must show both that he was acting within the scope of his employment and that he was performing a discretionary function. *Id.* at 299. The Westfall Act confers personal immunity on federal employees from all common-law tort claims arising out of acts taken within the scope of their employment, thus eliminating the discretionary function requirement of common law immunity under *Westfall*. See *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 425-426 (1995); H.R. Rep. No. 700, 100th Cong., 2d Sess. 4 (1988).[1]

The Westfall Act provides that the remedy available against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for "injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment" is exclusive, and bars any damages action against the employee "arising out of or relating to the same subject matter." 28 U.S.C. 2679(b)(1). When a lawsuit is filed against a federal employee rather than the United States, the Westfall Act authorizes the Attorney General

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[1] The Westfall Act excludes from its coverage suits against an employee "for a violation of the Constitution" and suits against an employee for a violation of a federal statute when "otherwise authorized." 28 U.S.C. 2679(b)(2).

or his designee to issue a certification that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1).[2] Once the Attorney General issues a determination that the employee was acting within the scope of his or her employment, the suit "shall be deemed an action against the United States" under the FTCA, and "the United States shall be substituted as the party defendant." *Ibid.*

If the suit was initiated in state court, the Westfall Act further provides that, upon the Attorney General's certification, the action shall be removed to federal district court, where it will proceed against the United States as the substituted defendant. 28 U.S.C. 2679(d)(2). The Act specifies that the Attorney's General certification "conclusively establish[es] scope of office or employment for purposes of removal." *Ibid.*

The Attorney General's decision to certify, or not to certify, that the employee was acting within the scope of his or her employment is reviewable by the district court. In *Lamagno*, *supra*, the Court held that the Attorney General's "scope-of-employment certification is reviewable in court" if the plaintiff challenges it. 515 U.S. at 420. The Westfall Act also expressly provides that if "the Attorney General has refused to certify scope of office or employment," the employee defendant may "petition the court to find and certify that the em-

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[2] The Attorney General has delegated this authority by regulation to United States Attorneys, who make scope certification determinations in consultation with the Department of Justice. See 28 C.F.R. 15.3 (1988). The Attorney General's delegation authority is set forth in 28 U.S.C. 510. See, *e.g.*, *United States* v. *Cuomo*, 525 F.2d 1285, 1287-1288 (5th Cir. 1976).

ployee was acting within the scope of his office or employment." 28 U.S.C. 2679(d)(3).

If the employee petitions for review of the Attorney General's refusal to certify in a case that is pending in state court, the Attorney General may remove the case to federal district court, which must then resolve the scope-of-employment dispute. 28 U.S.C. 2679(d)(3). In contrast to removal after the Attorney General issues a scope certification—in which case, that certification is "conclusive[] * * * for purposes of removal," 28 U.S.C. 2679(d)(2)—the Westfall Act provides that where the Attorney General removes a case to defend against an employee's petition for judicial certification over the Attorney General's objection, "the action or proceeding shall be remanded to the State court" if the district court rejects the employee's petition, 28 U.S.C. 2679(d)(3).

2. Petitioner Pat Osborn was an employee of Land Between the Lakes Association (LBLA), which is contracted to provide services at the Land Between the Lakes National Recreation Area in Kentucky. The Recreation Area is administered by the United States Forest Service. Osborn applied for a job with the Forest Service, but was not hired. The Forest Service employee responsible for that hiring decision, Barry Haley, announced the hiring of another person in a meeting with LBLA employees at which Osborn was present. Osborn made comments to Haley at the meeting, in front of other employees, about the hiring decision that may have embarrassed Haley, and Osborn's supervisor shortly thereafter asked that she apologize to Haley. Osborn refused. Osborn later filed a complaint with the Department of Labor (DOL), questioning whether the Forest Service's hiring decision had given appropriate

consideration to veterans' preference points to which Osborn was entitled. The DOL investigator, Robert Kuenzli, consulted with Haley and found that the decision was handled properly. Thereafter, on the same day that the DOL investigator had called Haley, the executive director of LBLA summoned Osborn and demanded again that she apologize to Haley for her behavior at the May 20 meeting. Osborn again refused, and she was fired by LBLA two days later. Pet. App. 20a-21a.

3. Osborn filed suit in state court asserting claims (1) against LBLA and its executive director, Gaye Luber Gieselman, alleging that she had been terminated in violation of public policy in retaliation for inquiring with DOL about the handling of her veterans' preference points, (2) against Haley, alleging interference with Osborn's employment relationship with LBLA, and (3) against all the defendants, alleging conspiracy wrongfully to discharge Osborn and conspiracy to interfere with her employment relationship. Pet. App. 21a. The United States Attorney certified, under 28 U.S.C. 2679(d)(1), that Haley "was acting within the scope of his employment * * * at the time of the conduct alleged in the Complaint." August 20, 2003, Certification of Acting United States Attorney Monica Wheatley. The United States then removed the case to the United States District Court for the Western District of Kentucky and moved to dismiss the claims against the United States for failure to comply with the FTCA's administrative exhaustion requirement. Pet. App. 19a. In its motion to dismiss, the United States did not specifically deny "any of the factual allegations contained in Ms. Osborn's complaint." *Id.* at 22a. In response to the government's motion, Osborn submitted a copy of a Memorandum of Understanding between the Forest

Service and LBLA, which provided, *inter alia*, that Forest Service employees would not participate in the hiring or firing of LBLA employees. *Id.* at 23a. The United States emphasized in its reply that it did not dispute the specific facts that were alleged in Osborn's complaint but argued that Osborn could not overcome the presumption in favor of the Attorney General's certification decision by simply relying on an unsupported inference that Haley had called LBLA after the DOL inquiry and insisted that Osborn be fired. Mot. to Dismiss Reply 3-4.

The district court held that under Kentucky law, which governs the substantive question of scope of employment under the FTCA, *Williams* v. *United States*, 350 U.S. 857 (1955), the temporal proximity of the DOL investigation and Osborn's firing was "enough to raise [an] inference" that Haley had taken retaliatory steps to cause Osborn's termination. Pet. App. 24a. Further, the court found that, in light of the Memorandum of Understanding providing that the Forest Service would not participate in the hiring or firing of LBLA employees, "any interaction Mr. Haley might have had regarding Ms. Osborn's employment was out of the scope of his duties with the Forest Service." *Id.* at 23a. In addition, the district court held that Haley's alleged actions would not have furthered the Forest Service's interests or been a foreseeable result of his employment. *Ibid.* The court concluded that the "certification is inappropriate" and on that basis denied the United States' notice of substitution and motion to dismiss. *Id.* at 24a. The district court also held that the rejection of the United States' substitution deprived the court of jurisdiction over the suit and ordered the case remanded to state court. *Id.* at 24a-25a.

The government moved for reconsideration. In support, the government submitted declarations from both Haley and Luber, the LBLA director. Haley swore that he had not spoken with Luber between the time of the DOL investigation and Osborn's firing and that he did not "attempt to influence Luber's independent decision to fire Ms. Osborn." Haley Decl. 1-2. Luber similarly swore that Osborn's DOL complaint "was not and could not have been a factor in my decision to terminate Ms. Osborn, because I did not know it had occurred." Luber Gieselman Decl. 1. The government argued that the affidavits "provide ample evidence that Barry Haley never acted outside the scope of his employment and directly and specifically controvert any allegations to the contrary." Reconsid. Mot. 6. The government urged that those affidavits were sufficient, in the absence of contradictory evidence from Osborn, to support the U.S. Attorney's scope determination, or, at the very least, to warrant limited discovery and a hearing to resolve the disputed issue of fact. *Id.* at 7-8. Alternatively, the government argued that "discovery * * * could also reveal evidence supporting an argument that, even if the allegations are true, the alleged conduct falls within the relevant Kentucky law on scope" of employment. *Id.* at 8. The government continued, "[a]ssuming, for the sake of argument only, that Haley and Luber interacted regarding plaintiff's employment," the facts might support a conclusion that Haley's conduct was within the scope of Haley's employment under Kentucky law. *Ibid.*

The district court denied the motion to reconsider. Pet. App. 12a-16a. The court noted a circuit conflict on the question of how to deal with a Westfall Act certification that was "based on an argument that no harm-causing incident ever took place." Pet. App. 14a (citing

Wood v. *United States*, 995 F.2d 1122, 1124 (1st Cir. 1993) (en banc) (Breyer, C.J.) (holding that the certification "cannot deny the occurrence of the basic incident charged"), and *Kimbro* v. *Velten*, 30 F.3d 1501, 1508-1510 (D.C. Cir. 1994) (expressly rejecting *Wood* and holding that the district court must resolve the merits of the underlying dispute in such a circumstance), cert. denied, 515 U.S. 1145 (1995)). Purporting to follow the First Circuit's decision in *Wood*, the district court denied the United States' request for an evidentiary hearing on whether Haley had attempted to influence Luber's decision. Pet. App. 15a. The court also rejected the United States' request for discovery as to whether, in the alternative, there had been some interaction between Haley and Luber that was within the scope of Haley's employment. The court would not allow the United States to make arguments that were inconsistent with Haley's sworn declaration that no such interaction occurred. *Id.* at 14a.

3. On appeal, the Sixth Circuit reversed. Pet. App. 1a-11a. The court of appeals analyzed the appeal as presenting the question "whether district courts evaluating a scope certification can resolve material disputes about the facts 'upon which the plaintiff would predicate liability,' or whether instead courts must accept the plaintiff's allegations of such 'merits facts.'" *Id.* at 4a (quoting *Melo* v. *Hafer*, 13 F.3d 736, 742-743 (3d Cir. 1994)). The court of appeals noted that there was a clear split in the circuits on that issue. The court recognized that the First Circuit had held in *Wood* that "the Westfall Act does not permit judicial factfinding where the Attorney General's certification essentially denies the plaintiff's central allegations of wrongdoing, but instead requires courts to accept as true the plaintiff's allegations (as the

district court did here)," while allowing the Attorney General "to dispute the plaintiff's *description* of the tortious incident alleged—'incident-characterizing facts.'" *Id.* at 5a. The court of appeals observed, however, that the "majority" of circuits, including the D.C., Third, and Eighth Circuits, had rejected *Wood*. *Id.* at 6a-7a. The court of appeals then elected to "join the majority of the circuits" and held that "where the Attorney General's certification 'is based on a different understanding of the facts than is reflected in the complaint,' * * * including a denial of the harm-causing incident, the district court must resolve the factual dispute." *Id.* at 8a (quoting *Melo*, 13 F.3d at 747). The court of appeals cited, among other reasons, the need for the employee's immunity to be decided at the outset of the litigation and the difficulty of administering the *Wood* majority's distinction between denial of an incident and recharacterization of the incident. *Id.* at 6a-7a. The court of appeals therefore remanded to the district court for a hearing to "resolve the factual disputes underlying the scope question, including whether the alleged incident occurred." *Id.* at 11a.

The court of appeals also addressed the question whether, if substitution is ultimately not upheld, the district court must remand the case to state court for want of jurisdiction. The court held that, in light of the Westfall Act's language stating that the "certification of the Attorney General shall *conclusively* establish scope of office or employment for purposes of removal," 28 U.S.C. 2679(d)(2) (emphasis added), the "clear language of the Act forecloses remand." Pet. App. 10a. The court acknowledged, however, the "circuit split" on that issue as well. *Id.* at 8a-10a (citing decisions of the Third, Fourth, and Fifth Circuits holding that remand was im-

proper, and decisions of the D.C. and First Circuits holding that remand was required).

DISCUSSION

Petitioner correctly observes (Pet. 7-8, 13-14) that the courts of appeals are divided on two questions relating to judicial review of scope-of-employment certifications under the Westfall Act: (1) the extent to which the Attorney General's certification may depend upon a determination that one or more of the allegations of the complaint is untrue; and (2) whether, if the district court overrules the Attorney General's certification in a case that was removed from state court, the action must be remanded. While both circuit conflicts are somewhat stale and this case is in an interlocutory posture, on balance, the Court should grant review on both questions.

1. a. As petitioner states (Pet. 6), there is a conflict among the circuits with respect to whether the Attorney General may issue a Westfall Act certification based on a denial that the alleged incident occurred. In the first appellate decision to address the issue, *McHugh* v. *University of Vermont*, 966 F.2d 67 (1992), the Second Circuit stated, without elaboration, that the district court must, in resolving a contested scope determination, "assume that plaintiff's allegations are true," *id.* at 75, and construe them "in the light most favorable to the plaintiff," *id.* at 74. The court also stated that "the government may not deny that acts were within the scope of employment by denying that the acts occurred." *Ibid.*[3]

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[3] The dissenters in *Wood* questioned whether those statements by the Second Circuit, in an opinion devoted primarily to other issues, reflected an intent to resolve the issue presented here. See *Wood*, 995 F.2d at 1136 (Coffin, Selya, and Boudin, J.J., dissenting). The Second Circuit does not appear to have confronted the issue of what allegations

In *Wood* v. *United States*, 995 F.2d 1122 (1993), the en banc First Circuit adopted a slightly different approach. The First Circuit held that the Attorney General's "certificate cannot assert 'immunity' simply by denying that anything occurred," but "must assume the existence of an 'incident out of which the claim arose.'" *Id.* at 1129. On the other hand, in contrast to the Second Circuit in the passages quoted above, the First Circuit concluded that the Attorney General was "free to dispute characterizations of the incident and subsidiary immunity-related facts," including factual allegations essential to the plaintiff's cause of action, such as an allegation that the employee caused the harm intentionally. *Ibid.* *Wood* provides that, in such cases, there should be a hearing in federal district court to resolve the factual dispute regarding the allegation. *Ibid.* The First Circuit saw that such an exception to the general rule it announced was necessary because a plaintiff might otherwise, "through artful pleading, transform a job-related tort into a non-job-related tort," and "federal employees [would] lose, in practice, the job-related immunity that Congress clearly intended the Westfall Act to provide." *Ibid.* The *Wood* majority acknowledged that this necessary limitation on its rule presented an "administrative problem" of line-drawing, *ibid.*, which was one reason the dissenters argued for rejecting the majority's approach altogether, *id.* at 1136 (Coffin, Selya, and Boudin, J.J., dissenting).[4]

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the Attorney General must accept in making his scope certification since *McHugh* issued. We assume, for purposes of argument, that the Second Circuit's statements quoted in the text constitute a holding.

[4] Although the majority in *Wood* stated (995 F.2d at 1128, 1129) that its approach was the same as that of the Second Circuit in *McHugh*, the Second Circuit's opinion appears to limit the Attorney General's

Since *Wood*, every court of appeals to reach the question has held that the Attorney General is free to base a scope-of-employment certification on his own assessment of the facts, even if contrary to the central allegation of the complaint, and that the federal court must conduct a factual inquiry. In *Melo* v. *Hafer*, 13 F.3d 736, 746 (1994), for example, the Third Circuit held that "the Attorney General may file a scope of employment certificate based on a finding that the defendant did not engage in the conduct alleged by the plaintiff." The D.C. Circuit similarly held in *Kimbro* v. *Velten*, 30 F.3d 1501 (1994), cert. denied, 515 U.S. 1145 (1995), that "the statutory language describing certification does not preclude a disavowal through certification that the harm-causing event actually occurred." *Id.* at 1508. See *Heuton* v. *Anderson*, 75 F.3d 357, 360 (8th Cir. 1996). The Sixth Circuit concurred in that view. Pet. App. 8a.

The courts that have rejected *Wood* have emphasized two principal points. First, the courts have noted an inconsistency between the *Wood* analysis, which was based on the language of Section 2679(d)(1), and Section 2679(d)(3), which the *Wood* majority did not discuss. Section 2679(d)(1) provides that the United States shall be substituted if the Attorney General certifies that the defendant employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." In the First Circuit's view, that language implies that the Attorney General must assume the occurrence of some "incident" underlying the plaintiff's claim. 995 F.2d at 1123, 1125-1126. Subsequent decisions have emphasized that the district court's

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certification to the facts alleged, and permits a factual inquiry only with respect to the "context of the alleged acts" as they are relevant to the scope-of-employment issue. *McHugh*, 966 F.2d at 74.

authority to make a scope-of-employment determination at the request of a defendant employee pursuant to 28 U.S.C. 2679(d)(3) does not have the "time of the incident" language on which the First Circuit relied. See *Melo*, 13 F.3d at 746-747; *Kimbro*, 30 F.3d at 1508; *Heuton*, 75 F.3d at 360; Pet. App. 6a-7a. As those other courts of appeals have observed, it is unlikely that Congress intended the Attorney General to be more circumscribed by the plaintiff's allegations than the district court is when it makes a scope-of-employment determination at the behest of the defendant. *Ibid.* In addition, the later appellate decisions have emphasized the practical, as well as theoretical, difficulty in drawing the kind of distinctions "between *characterization* of an incident and *denial* of an incident" required by *Wood*, *id.* at 6a; *Kimbro*, 30 F.3d at 1507; *Melo*, 13 F.3d at 743, 746, something that the *Wood* majority itself acknowledged, 995 F.2d at 1129.

b. Petitioner frames the first question presented in a manner that appears to set to one side the approach suggested by *McHugh*, under which the Attorney General must accept all of the allegations of the plaintiff's complaint and construe them in the light most favorable to the plaintiff, by posing the question in the terms employed by the First Circuit in *Wood*: whether the Attorney General may "deny[] that such incident occurred at all." Pet. i. In addition, petitioner claims that "the present case does not raise what the First Circuit in *Wood* called a potential 'administrative problem' that can arise when the court confronts 'the difference between denying facts that amount to a 'characterization' or 'description' (which *Wood* permits the Attorney General to do) and 'denying that any harm-causing incident occurred at all' (which is foreclosed by *Wood*)," Pet. 19 (quoting 995

F.2d at 1129-1130).[5] In fact, however, the "administrative problem" noted by *Wood* is fully evident on the facts of this case. Indeed, the Sixth Circuit's order remanding this case to the district court for an evidentiary hearing would have been appropriate even under the approach in *Wood*.

The First Circuit acknowledged in *Wood* that the Westfall Act does not require the Attorney General to concede as fact that the alleged incident occurred, but merely to "assume" that it did "for immunity-asserting purposes." 995 F.2d at 1126. See *id.* at 1129; *id.* at 1125 (certification must "claim that a (hypothetically conceded) 'incident' involved activity that was 'within the

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[5] Petitioner bases that contention on the court of appeals' statement that "the United States 'conceded that if Haley induced [petitioner's] firing, he acted outside the scope of his employment' with the U.S. Forest Service." Pet. 18-19 (quoting Pet. App. 3a). In making that statement, the court of appeals may have relied on the acknowledgement in the appellant's brief that "the Memorandum of Understanding [between the Forest Service and LBLA] only showed that, if Haley did cause the Contractor to fire Osborn, he acted outside the scope of his employment." Haley C.A. Br. 21. That sentence, however, recognized that it would have been outside the scope of his employment for Haley to orchestrate Osborn's firing with the intent of retaliating against her for filing a DOL inquiry, as the complaint alleges. But the government has specifically disputed in this case that it would necessarily have been outside the scope of his employment for Haley to take actions that might have influenced Osborn's firing by, for example, raising concerns about her ability to be a good partner to the Forest Service. Reconsid. Mot. 8. Even assuming, *arguendo*, that influencing Osborn's firing for such reasons would have violated the Memorandum of Understanding between the Forest Service and LBLA, that would not mean that Haley acted outside the scope of his employment in doing so. See, *e.g.*, *Heuton*, 75 F.3d at 361 ("It is true that * * * posting the picture was unquestionably prohibited by the USDA, but that does not mean that the act was necessarily outside of the scope of Anderson's employment.").

scope of employment'"). In *Wood*, which involved an alleged assault and battery of a sexual nature by an Army Major against his civilian secretary, *id.* at 1123-1124, the court observed "[w]e do not see how [the Attorney General] could characterize the incidents at issue in a way that would bring them within defendant's 'line of duty,' and it has not tried to do so," *id.* at 1130.

In this case, the United States did attempt to make an argument "assuming *arguendo*" the existence of an incident, but was precluded from doing so by the district court. The United States' motion to reconsider specifically argued, in the alternative, that because it was unclear what evidence Osborn would rely on in support of her claim, it was possible that discovery could "reveal evidence supporting an argument that, *even if the allegations are true*, the alleged conduct falls within the relevant Kentucky law on scope." Reconsid. Mot. 8 (emphasis added). See *ibid.* ("*[a]ssuming, for the sake of argument only*, that Haley and Luber interacted regarding plaintiff's employment," the facts might support a conclusion that Haley's conduct was within the scope of his employment under Kentucky law (emphasis added)). For example, if Osborn offered testimony in support of her tortious interference claim that someone overheard Haley say to Luber that he thought Osborn's conduct at the May 20, 2002, meeting was inappropriate and called into question whether she was a good fit for LBLA's project with the Forest Service, the government could assume that such a conversation occurred, but contest the characterization that Haley said it with an intent to retaliate against Osborn for filing the DOL complaint or even to get Osborn fired.

The district court refused to allow the government to make that alternative argument in light of Haley's decla-

ration, in which he stated that he had not discussed with Luber Osborn's DOL complaint or attempted to influence Luber's decision to fire Osborn. Pet. App. 13a-14a. In so ruling, the district court refused to permit the government to do precisely what *Wood* endorsed, *i.e.*, to "assume *some kind of harm-causing incident*, while leaving the Attorney General free to dispute characterizations of the incident and subsidiary immunity-related facts." 995 F.2d at 1129.[6]

c. The circuit conflict on the question of the scope of the Attorney General's certification authority is somewhat stale, since no court of appeals has adopted petitioner's position since the First Circuit's divided decision in *Wood* more than 12 years ago. Since then, all four courts of appeals to have considered the question have reached the contrary conclusion, and neither the First nor Second Circuit has revisited the issue in light of the subsequent decisions of the other courts of appeals.

Moreover, the fact that the district court's order could have been reversed and the case remanded for an evidentiary hearing even under the *Wood* approach may make this case a less than ideal vehicle for resolving the

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[6] The district court was wrong to think that the alternative argument above would necessarily contradict Haley's declaration. That declaration stated only that Haley had not spoken to Osborn "regarding the [DOL] inquiry" or "Osborn's veteran's status" and that he had not "attempt[ed] to influence [Luber's] independent decision to fire Ms. Osborn." Haley Decl. 1-2. Even if there were an inconsistency with Haley's affidavit, *Wood* does not preclude the Attorney General from making a certification on the assumption that some incident did occur, but then litigating on the ground that it did not.

circuit conflict that does exist.[7] And any uncertainty on whether a remand under *Wood* would be appropriate simply demonstrates the inherent difficulty with the distinction that is at the heart of the *Wood* decision. While the foregoing considerations weigh against certiorari, on balance, the Court should grant review.

2. a. The second question presented in the petition is whether the Attorney General's certification "conclusively" establishes the district court's removal jurisdiction, thereby barring the district court from remanding the case back to state court in the event the court ultimately rejects the certification. As noted, Section 2679(d)(2) provides that "[t]his certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." The issue is whether the plain language of Section 2679(d)(2) controls and should be given effect by precluding the district court from remanding the case back to state court in the event the court rejects the certification of the Attorney General.

As petitioner states (Pet. 13-14), there is a square conflict on this question. Four circuits, the Third, *Aliota* v. *Graham*, 984 F.2d 1350, 1356 (Alito, J.), cert. denied, 510 U.S. 817 (1993), the Fourth, *Borneman* v. *United States*, 213 F.3d 819, 826 (2000), cert. denied, 531 U.S. 1070 (2001), the Fifth, *Garcia* v. *United States*, 88 F.3d

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[7] The government argued in the court of appeals that if the court did not reverse the district court's decision outright and order that the United States be substituted for Haley as a defendant, the court should at least remand for an evidentiary hearing on whether Haley committed acts outside the scope of his employment. Haley C.A. Br. 29. The government did not specifically argue, however, that the case should be remanded for an evidentiary hearing under the approach adopted by the First Circuit in *Wood*.

318, 325 (1996), and the Sixth, Pet. App. 10a, have held that the district court has no authority to remand a case back to the state court should certification be rejected. The Eleventh Circuit, in *Green* v. *Hill*, 954 F.2d 694, on reh'g, 968 F.2d 1098 (1992), has held that the district court has "discretion" over whether to remand the case to the state court.

In contrast, the First Circuit, in *Nasuti* v. *Scannell*, 906 F.2d 802 (1990), held that "[i]f the district court finds that Scannell was acting *outside* the scope of his employment, it shall remand the case back to the state superior court." *Id.* at 814. The D.C. Circuit imposed the same remand requirement in *Haddon* v. *United States*, 68 F.3d 1420, 1427 (1995). In so ruling, the D.C. Circuit expressly rejected the Third Circuit's contrary holding in *Aliota*. *Id.* at 1426. There is, thus, as petitioner states (Pet. 13), a three-way split in the circuits concerning the scope of the district court's authority to order a remand.

Like the circuit conflict on the first question presented, however, the conflict on the second question is also somewhat stale. The second of the two appellate decisions adopting petitioner's position on this issue was rendered by the D.C. Circuit in *Haddon* more than 10 years ago. Since then, three courts of appeals, including the Sixth Circuit in this case, have rejected petitioner's position. Furthermore, this case is in an interlocutory posture, because the court of appeals remanded for a determination whether respondent was acting within the scope of his employment; only if the district court concludes that he was not would the question of remand to the state court have any concrete significance in this case, and that issue could be raised on subsequent review in the court of appeals.

b. Significantly, moreover, the eight Justices who joined either the plurality or the dissenting opinion in *Lamagno* read the text of 28 U.S.C. 2679(d)(2), which provides that the Attorney General's certification that the employee was acting within the scope of his employment shall be "conclusive * * * for purposes of removal," to bar remand to the state court if the federal district court overturns the Attorney General's certification. See 515 U.S. at 434 (plurality opinion of Ginsburg, J.); *id.* at 440 (Souter, J., dissenting). Indeed, the same view is also reflected in the portion of Justice Ginsburg's opinion that constituted the opinion of the Court, which was joined by Justice O'Connor. See *id.* at 432 & n.8, 433 n.10.

A plurality of four Justices—Justice Ginsburg, joined by Justices Stevens, Kennedy, and Breyer— addressed and rejected an Article III objection to this interpretation, *viz.*, that if the certification is given "conclusive" effect for purposes of removal, as required by the language of Section 2679(d)(2), "then the federal court will be left with a case without a federal question to support the court's subject-matter jurisdiction." 515 U.S. at 435. The plurality found this argument unpersuasive, concluding that the scope-of-employment issue under the Westfall Act "is a significant federal question" and that removal by the Attorney General on his certification therefore "raises [a] questio[n] of substantive federal law at the very outset" of the litigation. *Id.* at 435 (alteration in original) (quoting *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493 (1983)). The plurality reasoned that "'[C]onsiderations of judicial economy, convenience and fairness to litigants' make it reasonable and proper for the federal forum to proceed beyond the federal question to final judgment once it has invested

time and resources on the initial scope-of-employment contest." *Id.* at 436 (alteration in original) (quoting *United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 726 (1966)).

Justice O'Connor, in her concurring opinion, specifically declined to join in this Article III discussion of the *Lamagno* plurality, stating that resolution of the issue was a "difficult question" that was "not presented in this case." 515 U.S. at 437.

Justice Souter dissented in an opinion in which Chief Justice Rehnquist and Justices Scalia and Thomas joined. The dissent agreed that the statutory language is clear: "there is nothing equivocal about the Act's provision that once a state tort action has been removed to a federal court after a certification by the Attorney General, it may never be remanded to the state system." *Lamagno*, 515 U.S. at 440 (citing 28 U.S.C. 2679(d)(2)). The dissent expressed the view, however, that, for this reason, judicial review of the Attorney General's scope-of-employment certification would raise a "serious" question whether the retention of jurisdiction after rejection of the United States' substitution would "cross the line" of the courts' Article III jurisdiction. *Id.* at 441.

However this Court might resolve the Article III issue, the opinions in *Lamagno* are highly instructive on the statutory remand question, even though that case did not directly raise the issue because it was initially filed in federal court. It is true that the D.C. Circuit's split decision in *Haddon* holding that remand is required post-dated *Lamagno*. But while the majority in *Haddon* recognized that the dissenting Justices in *Lamagno* had read 28 U.S.C. 2679(d)(2) to bar a remand if the district court overturns the Attorney General's scope determi-

nation, 68 F.3d at 1427, the majority failed to recognize that the plurality (and perhaps the opinion of the Court) in *Lamagno* read Section 2679(d)(2) in the same way. Other courts of appeals, by contrast, have recognized the significance of *Lamagno* in resolving this issue. See *Bornman*, 213 F.3d at 825-826; *Garcia*, 88 F.3d at 323-327; see also Pet. App. 9a (citing plurality but not dissenting opinion). In light of the opinions in *Lamagno* and the more recent trend of appellate decisions, it is possible that the D.C. Circuit and First Circuit, if presented with the question anew, would reconsider their respective decisions. And, of course, this case presents the issue in an interlocutory posture—interlocutory even as to the interlocutory issue of the appropriateness of a remand to state court, because the district court may still find the Attorney General's scope certification proper and thus moot any question of remand to the state court. Accordingly, as with the first question presented, there are considerations that weigh against certiorari to resolve the second question. On balance, however, the Court should grant review on the second question if it grants review on the first question.

c. Finally, we submit that Article III is not violated by the "conclusive" removal provision of Section 2679(d)(2). As the Court held in *Verlinden*, *supra*, the "Article III 'arising under' jurisdiction is broader than federal-question jurisdiction under § 1331." 461 U.S. at 495. The Court thus noted that, under *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), the "arising under" Article III jurisdiction is a "broad conception" under which "Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law." *Verlinden*, 461 U.S. at 492. In *Verlinden*, the Court did not "decide

the precise boundaries of Art. III jurisdiction, * * * , since the present case does not involve a mere speculative possibility that a federal question may arise at some point in the proceeding," but, rather, "necessarily raises questions of substantive federal law"—the immunity of a foreign state from suit—"at the very outset, and hence clearly 'arises under' federal law, as that term is used in Art. III." *Id.* at 493.

The Westfall Act is not a "pure jurisdictional statute," like a federal removal statute, that purports simply to accord jurisdiction over a defined class of claims or persons. See *Mesa* v. *California*, 489 U.S. 121, 136 (1989). Rather, like the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, which was at issue in *Verlinden*, the Westfall Act is "comprehensive scheme" comprising both pure jurisdictional provisions (removal) and federal law capable of supporting Article III "arising under" jurisdiction. See *Verlinden*, 461 U.S. at 496-497; see also *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004).

Specifically, like the FSIA, the Westfall Act does not merely govern access to federal court, but governs as well the type of cases that may be removed (tort cases certified by the Attorney General under Section 2679(d)(2) or in which the employee has petitioned for certification under Section 2679(d)(3)), the standard (scope of employment) for assessing the propriety of the substitution of the United States for the employee, and the consequences of such substitution of the United States (immunity from suit for the employee and applicability of all the defenses available to the United States under the FTCA). Thus, just as the FSIA "comprehensively regulat[es] the amenability" of foreign sovereigns "to suit in the United States," the Westfall Act "compre-

hensively regulat[es] the amenability" of federal employees to suit in both federal and state courts. *Verlinden*, 461 U.S. at 493. As *Verlinden* holds, the presence of such a comprehensive regulatory scheme is alone sufficient to pass muster under Article III.

Indeed, the analogy to *Verlinden* is particularly close in that under both the Westfall Act and FSIA, "the rule of decision may be provided by state law." 461 U.S. at 491. Just as there was a strong federal interest in *Verlinden* concerning the question of what types of suits should be brought against foreign sovereigns, *id.* at 493, there is a similar undeniable federal interest in allowing federal courts to adjudicate tort actions involving federal employees who have been certified by the Attorney General as acting within the scope of their employment. See *Lamagno*, 515 U.S. at 426.

That federal interest in giving the Attorney General's certification "conclusive" effect is particularly strong under the district court's approach to the first question presented. Even if the Attorney General's scope-of-employment certification is determined to be inappropriate based upon the particular facts so far alleged by Osborn in support of her claims, it is entirely possible that discovery will reveal that plaintiff intends to rely on evidence of purportedly tortious acts by Haley that *were* within the scope of his employment, such as complaining to Luber about Osborn's conduct at the May 20, 2002, meeting. Thus, because there is an ongoing possibility that substitution would become appropriate under *Wood* depending upon what new evidence the plaintiff offers regarding the defendant's conduct, the federal question will be present throughout the litigation. In this respect, it is perfectly understandable and appropriate for Congress to accord "conclusive[]" weight

for removal purposes to the Attorney General's certification that the defendant acted within the scope of his employment, while providing for remand to state court where the Attorney General has removed the case solely to defend against a petition for certification over his objection.

Finally, as the plurality observed in *Lamagno*, there are sound practical reasons to keep the case in federal court after the scope determination is made. Remanding the case to state court would waste judicial resources, both in the federal court, which would have already become familiar with the case, and in the state court, which would have to duplicate that familiarity upon any remand. As the plurality noted in *Lamagno*, by making the Attorney General's certification "conclusive[] * * * for purposes of removal," 28 U.S.C. 2679(d)(2), Congress "decided to foreclose needless shuttling of a case from one court to another." 515 U.S. at 433 n.10.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 05-593

In The Supreme Court of the United States

PAT OSBORN, PETITIONER,

v.

BARRY HALEY, ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS, GAYE VERDI f/k/a GAYE LUBER AND LAND BETWEEN THE LAKES ASSOCIATION, INC.

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QUESTIONS PRESENTED

1. Whether the Attorney General may concede hypothetically the plaintiff's factual allegations, in certifying that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose," within the meaning of the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. § 2679(d).

2. Whether the Westfall Act's provision that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal" of the suit from state court, 28 U.S.C. § 2679(d)(2), means that a district court must retain jurisdiction over the removed suit, even if the court ultimately overturns the Attorney General's scope-of-employment certification and declines to substitute the United States as the defendant.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. R. 29(c), Respondent Land Between the Lakes Association, Inc., states that it is not the subsidiary of any other corporate entity, nor does any publicly held corporation own more than ten percent (10%) of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A at 1a-11a) is reported at 422 F.3d 359 (6th Cir. 2005). The memorandum and order of the district court denying the motions for substitution and dismissal filed by the United States (Pet. App. C and D at 17a-25a) and the opinion and order denying reconsideration of that order (Pet. App. B at 12a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered September 8, 2005. The petition for a writ of certiorari was filed November 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This matter involves interpretation of the Federal Employees Liability Reform and Tort Compensation Act of 1988, also known as the Westfall Act, Pub. L. No. 100-694, 28 U.S.C. § 2679(d), the full text of which appears as App. E to the Petition.

STATEMENT OF THE CASE

The United States has not conceded that its employee's alleged conduct was outside the scope of his employment if it occurred.

The Petition rests upon a mistaken premise, the fallacy of which severely undercuts Petitioner's reasons

why the Court should review this case. Petitioner asserts that the United States conceded that its employee Barry Haley's alleged conduct was outside the scope of his federal employment, so that the only question in dispute is whether these allegations are true. *See* Pet. at 2, 3, 6, 10, 16, 18, 19. However, no such concession is found in the district court record.

To the contrary, the United States specifically denied the allegations that Haley acted outside the scope of his employment. *Compare* App. A, Compl. at ¶¶ 29, 34, and 41 *with* App. B, United States' Answer at ¶¶ 14 (denying ¶ 29 of the Complaint), 16 (denying ¶ 34 of the Complaint), and 19 (denying ¶ 41 of the Complaint). The Answer contains no "concession" that Haley's alleged acts would have been outside the scope of his employment if they occurred.

Instead, the Acting United States Attorney certified that Barry Haley was acting within the scope of his employment at the time of the conduct alleged in the Complaint. *See* App. C, Certification. The Certification contained no further explanation, and no concession that Haley's alleged actions would have been outside the scope of his employment even if they had occurred. *Id.*

Accordingly, the United States moved to dismiss Osborn's Complaint, citing the Acting U.S. Attorney's Certification that Haley acted within the scope of his employment, and the Petitioner's need to exhaust her administrative remedies under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* before suing the United States. *See* App. D, United States' Mot. to Dismiss. Like the United States' Answer, the Motion contains no concession that

Haley's alleged acts would have been outside the scope of his employment if they occurred. *See id.*

Osborn responded to the Motion by arguing that the following alleged facts showed that Haley acted outside the scope of his employment: (1) the Complaint alleges that Haley "induced, persuaded, or coerced defendant Gaye Luber [now Verdi] to discharge plaintiff of her job . . . "; (2) a Memorandum of Understanding between the U.S. Forest Service and the Land Between the Lakes Association, Inc. ("LBLA") stated that Forest Service employees would not participate in any LBLA decision concerning "hiring or firing" LBLA employees; and (3) Robert Kuenzli, a Department of Labor investigator, stated in a letter that Petitioner was fired because Kuenzli called Haley. *See* Petitioner's Resp. to United States' Mot. to Dismiss at 4, and Exs. thereto. However, the same letter described a meeting wherein Osborn drew a "big laugh" by criticizing Haley in front of nearly 80 people, resulting in her boss's request that she apologize to Haley; all before Kuenzli ever contacted Haley. App. E., Ex. C to Osborn's Resp. The letter also states that Osborn told Kuenzli that her boss, Tamara Newkum, told her that Haley had demanded she terminate Osborn for insubordination. *Id.* Further, when Kuenzli asked Osborn what it was that caused the insubordination, "she explained that it was the comment she made at the staff meeting to Mr. Haley." *Id.* Kuenzli's own account indicates Osborn was fired because of the comment made at the staff meeting, before Kuenzli's phone call; and that Osborn understood this.

In reply, the United States pointed out that the Petitioner had never alleged any facts showing that Haley acted outside the scope of his employment; rather, the Complaint (at ¶ 6) stated that Haley was "employed by the

Forest Service at all times related to the complaint." United States' Reply at 3. The allegations that Haley "wrongfully and maliciously induced, persuaded, or coerced defendant Gaye Luber to discharge plaintiff" were merely conclusory, and presented no *facts* supporting the allegation that Haley acted outside the scope of his employment; i.e., there were no specific facts or allegations that Haley even attempted to affect Osborn's employment. *Id.* at 4. Nowhere in its Reply did the Government concede that Haley's alleged acts were outside the scope of his employment if they occurred. Instead, the Reply merely pointed out the Petitioner's failure to meet her burden of proof on the question of scope; a burden which shifts to the plaintiff once the Certification is filed. *Id.*, p. 2 (citing several circuit court rulings).

When the District Court then issued its Memorandum and Order overruling the Certification, the court mistakenly concluded that

> . . . the United States does not deny any of the factual allegations contained in Ms. Osborn's complaint, i.e., that Mr. Haley talked with Ms. Luber regarding Ms. Osborn's complaint to the Department of Labor. Instead, the United States only disputes her legal conclusion that Mr. Haley was acting in his individual capacity during the relevant times.

Pet. App. D at 22a. In truth, the United States could not have literally denied such a specific factual allegation, because Osborn never made it. The United States did, however, point out the absence of such a factual allegation, and specifically denied Osborn's *conclusory* allegation that Haley induced her termination – in addition to denying that Haley acted outside the scope of his employment.

App. A, United States' Answer at ¶ 19 (denying the allegations in ¶ 41 of Osborn's Complaint). Nonetheless, the district court concluded that no evidentiary hearing was needed, because there was no conflicting evidence as to a material fact. *See* Pet. App. D at 22a.

In its Motion to Reconsider, the United States reminded the court that it had indeed vigorously contested Petitioner's allegations, and further attached affidavits from the individual defendants stating that they had never discussed Osborn's Veteran's Preference inquiry. Thus, the United States was compelled to supplement the record with specific, sworn statements refuting allegations that the Petitioner never specifically made. In addition, assuming "for the sake of argument only" that Haley and Luber "interacted regarding plaintiff's employment," the United States argued that Haley's alleged conduct in causing Osborn's firing could be construed as furthering his employer's goal of "partnering with competent contract employees in a healthy and productive work environment . . . " *Id.* Thus, if the previous record had left any doubt that the United States was *not* conceding that Osborn's conclusory allegation that Haley caused her firing described conduct outside the scope of his employment, this Motion removed it.

In responding to the United States' Motion to Reconsider, Osborn merely repeated her allegations that Verdi met with her to discuss problems with her employment on the same day that Haley was informed Osborn had filed a complaint with the Department of Labor, and that she was terminated by Verdi two days later. Again, she failed to allege *any* contacts between Haley and Luber regarding her employment.

Finally, in its order denying the United States' Motion to Reconsider, the district court accepted that it is "highly unlikely," in light of Haley's affidavit, that Osborn could develop proof demonstrating that Haley "interacted with Verdi regarding Osborn's employment." Pet. App. B at 14a. Nevertheless, the district court further explained that it could not decide the basic question of whether the communication occurred at all, and could not consider the United States' alternative legal argument, i.e., the argument that having Osborn fired could have benefited Haley's employer and been within the scope of his employment; as such alternative arguments would contradict Haley's declaration under oath. *Id.* Thus, having previously overruled the Certification without a hearing because the United States supposedly failed to deny the underlying "allegations," the district court later held that it must sustain its ruling without a hearing because the United States *did* come forward with proof refuting the underlying "allegations." Further, the district court simply declined to consider the legal argument that a Forest Service representative could conceivably act within the scope of his employment in attempting to influence a contractor to provide cooperative employees. Inherent in this rationale is the court's conclusion that Haley's involvement in Osborn's termination for *any* reason, whether related to the Department of Labor inquiry or otherwise, would have necessarily been outside the scope of his employment as a matter of law.

In summary, the United States never conceded that Petitioner's conclusory allegations, or her implied but never-stated underlying factual allegations, described conduct outside the scope of Barry Haley's employment. Instead, the district court prevented the United States from making the alternative legal argument that the

alleged conduct could have been within the scope of employment assuming it had occurred.

It follows that this is not the "simple and stark" case providing an "excellent vehicle" for review, as Petitioner suggests. It is not a case in which the parties agree that the defendant/employee's alleged conduct was necessarily outside the scope of his employment, under any version of the facts which could be presented. Rather, this is a case in which matters relevant to the characterization of the federal employee's alleged conduct have not yet been fully heard.

DISCUSSION

I. There is no "split" among the circuits regarding the district court's need to review the context and characterization of hypothetically-conceded conduct.

Petitioner relies on two cases to show there is a "split" among the circuits on the Attorney General's authority to issue "incident-denying" certifications: *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993); and *McHugh v. Univ. of Vermont*, 966 F.2d 67, 74 (2nd Cir. 1992). However, both involved allegations of sexual harassment, which is rarely, if ever, considered to fall within the scope of employment, and is certainly not the type of conduct intended for immunity protection under the Federal Tort Claims Act. Further, both courts carefully distinguished challenges to the context or characterization of the defendant's alleged conduct, which go beyond simple denials.

In *McHugh*, the defendant was accused of repeatedly joking about the plaintiff's contracting AIDS, stating that

he hoped she'd be able to avoid infection over the summer while he was away at camp; repeatedly suggesting that she must be living with someone; providing his definition of a secretary as a paid whore; and observing that it was "a good day to watch Catholic babies burn." *McHugh*, 966 F.2d at 68. The court ruled that the defendant's alleged conduct was outside the scope of his federal employment, because "it can hardly be contended that Wheeler's alleged conduct furthered the business of the United States government," and because a Vermont trial court decision had squarely held that sexual harassment of one employee by another is outside the scope of employment under Vermont law. *Id.* at 75.

McHugh did hold that the Government "may not deny that acts were within the scope of employment by denying that the acts occurred." *Id.* at 74. However, the court also held:

> The *context* of the alleged act that is relevant to the scope of employment issue is a matter of fact to be determined by the district court, however, *after an appropriate factual hearing. Whenever scope of employment is disputed*, substitution should be made only if the court finds that the alleged acts were within the scope of employment.

Id. at 74-75 (emphasis added).

In *Wood,* the alleged sexual harassment amounted to "assault and battery." *Wood*, 995 F.2d at 1123. The court noted that the House of Representatives' Report of the Act contains language suggesting that it does *not* allow an immunity certificate simply to deny an alleged killing, rape, assault, or some other "outrageous misconduct" that occurs during working hours. *Id.* at 1127. Further, in

Wood, the Government did not deny that the acts would have fallen outside the scope of employment had they occurred. *Id.* at 1124. The court concluded that the Attorney General's certificate cannot deny the basic "incident" charged, but that "the certificate need not accept the plaintiff's version of just *how* it occurred. *Id.* at 1123 (emphasis in original). The court further explained that the basic point of immunity doctrine is to provide a defense for conduct that falls into certain categories, *and that the point of the certificate is to assert a characterization of conduct, namely to claim that a hypothetically conceded incident involved activity that was within the scope of employment. See id.* at 1124-25.

In response to the defendant's concern that "Driver A" who admits negligence would receive immunity while less culpable "Driver B," who denies that any accident occurred, would not, the *Wood* court explained that "it could be so only where Driver A can claim that the underlying incident is job-related, while Driver B cannot make this claim, *even hypothetically for argument's sake.*" *Id.* at 1127 (emphasis added). Addressing the concern that a plaintiff might transform a job-related tort into a non-job-related tort simply by alleging an "off-duty" state of mind, or alleging that a negligent action was carried out intentionally, the court stated:

> Rather, we insist that the certificate assume some kind of *harm-causing incident*, while leaving the Attorney General free to dispute characterization of the incident and subsidiary immunity-related facts. The Second Circuit held the same in *McHugh*. 966 F.2d at 74. Moreover, we previously held that the Attorney General's certificate may contest a plaintiff's incident-describing and incident-characterizing facts and

> that the court may resolve any such factual conflicts, relevant to immunity, prior to trial.

Id. at 1129.

The *Wood* court then gave a very important illustration of this distinction between denying factual allegations and challenging their characterization if hypothetically conceded, based on its earlier holding in *Nasuti v. Scannell*, 906 F. 2d 802 (1st Cir. 1990). The court noted that in *Nasuti*, the plaintiff had alleged that a federal employee intentionally injured him by driving fast in order to jostle him and throw him from side to side in the back of a truck. The court explained: "We assumed that these factual allegations, if true, would have placed Scannell's actions outside the 'scope of his employment' . . . but, we held the immunity certificate valid, pending a pre-trial evidentiary hearing that would resolve the key immunity-related factual dispute, *namely whether Scannell intended to harm Nasuti.*" *Wood*, 995 F.2d at 1129 (citing *Nasuti*, 906 F.2d at 808) (emphasis added).

Remand of this case to the district court for a hearing on the scope of employment issue is consistent with *McHugh* and *Wood*. Unlike in those cases, the Petitioner has not alleged conduct, such as sexual assault or rape, which is clearly not entitled to the protection of immunity if it occurred, and would clearly be beyond the scope of employment under state law, under any version of events. Instead, Osborn alleged torts which the district court correctly ruled are not actionable if undertaken with a "purpose to serve the employer." Pet. App. D at 23a (citing *American Gen. Life & Accident Ins. Co. v. Hall*, 74 S.W.3d 688, 692 (Ky. 2003)). Further, the United States articulated motives that could have justified Haley's alleged

attempt to influence Osborn's employment as serving his employer; and Osborn herself put forth documentation that she was fired because she engaged in public ridicule of a Forest Service official as a contractor's employee, pointedly undermining that official's (Haley's) attempt to address the quality of communications between the two organizations. *See* App. E, Ex. C to Resp. This is hardly analogous to a case in which the only matter in dispute is whether rape, assault, or harassment either did or did not occur.

Additionally, the instant matter does not involve a situation in which the Government has merely denied the factual "allegations." Instead, the Government attempted to put the Petitioner to her proof, and then argued that even if Petitioner's allegations that Haley interfered with her employment were hypothetically true, Haley was entitled to a hearing to determine his intent or motive. Consistent with *Wood* and *Nasuti*, *supra*, Haley should have been given the opportunity to contest Osborn's "incident-describing" and "incident-characterizing" allegations, which were merely conclusory and did not even allege specific conduct. Paraphrasing the language of *McHugh*, *supra*, the district court should have considered all facts and arguments relevant to the *context* of Haley's alleged conduct and Osborn's termination, as Haley's alleged conduct was not necessarily inconsistent with a legitimate business purpose.[1]

[1] Indeed, under Kentucky law, even criminal assault has been deemed within the scope of employment, when intended to further the employer's purpose. *Patterson v. Blair*, 172 S.W.3d 361 (Ky. 2005).

Finally, Petitioner's own Complaint supports the argument that the claims against Haley described conduct within the scope of his employment. Plaintiff accused defendant Verdi of discharging her in violation of public policy; conspiring to wrongfully discharge plaintiff; conspiring to interfere with plaintiff's employment relationship; and outrageous conduct; all alleged to have been carried out in a "malicious, oppressive, and intentional manner in order to injure and damage plaintiff." *See* App. A, Compl. In each instance, Osborn alleged that Verdi acted within the scope of her employment as Executive Director of the defendant LBLA while performing these acts. *Id.*, ¶¶ 24, 26, 37, 38, 44, 45, 52, 61, and 63. It appears plaintiff pled her claims cleverly, in hopes of keeping Verdi's employer in the lawsuit, while keeping Haley's employer out. A true "bright-line" case, such as one alleging rape or sexual assault, could not accommodate such dual characterizations.

II. Since legal questions regarding scope of employment remain, this is not an ideal case through which to address any conflict between Article III and the clear statutory language making the Attorney General's certification conclusive for purposes of removal.

The fact that legal issues remain relevant to scope of employment also undermines Petitioner's second argument. Petitioner alleges that this Court should review the Sixth Circuit's directive that the case must remain in federal court, even if the district court determines after a hearing that certification was improper. Specifically, Petitioner acknowledges that in cases where the scope-of-employment question is subject to judicial review, although

"there may no longer be a federal question once the federal employee is re-substituted as defendant, . . . there *was* a non-frivolous federal question . . . when the case was removed to federal court." Pet. at 15-16, citing *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995) at 435 (plurality opinion). Thus, Petitioner continues, it can fairly be argued further that such a case "raises a question of substantive federal law at the very outset," and therefore "clearly arises under federal law, as that term is used in Art. III." Pet. at 16 ((quoting *Lamagno*) (quoting *Berlinden B.V. v. Central Bank of Nigeria*, 461 U.S.480, 493 (1983))). Petitioner then attempts to contrast the present case as one involving no dispute for the district court to resolve other than whether the alleged incident did in fact occur. *Id.* at 16. As demonstrated above, this is not correct, which removes the Article III concerns Petitioner attempts to raise. Under Petitioner's own analysis, if this Court concludes that a "colorable" federal question remains regarding the scope of Haley's employment, then this case is not an "ideal vehicle" for the Court to examine the constitutionality of the clear language of 28 U.S.C. § 2679(b)(2), which renders the Attorney General's certification conclusive for purposes of removal.

The split among the circuits on this question of remand is grounded squarely in constitutional concerns. Petitioner cites *Nasuti v. Scannell*, 906 F.2d 802, 814 (1st Cir. 1990), and *Haddon v. United States*, 68 F.3d 1420, 1427 (D.C. Cir. 1995), for the proposition that a district court cannot retain jurisdiction after concluding that the defendant acted outside the scope of his employment. Both courts cited constitutional concerns.

Further, *Nasuti* pre-dates the Supreme Court's opinion in *Lamagno, supra*, in which (as the United States

Response Brief points out) eight justices concluded that the plain language of 28 U.S.C. § 2679(b)(2) precludes remand to the state court if the federal district court overturns the Attorney General's certification. *See* 515 U.S. at 434, 440 (the dissent stating "there is nothing equivocal about the Act's provisions . . . "). Nevertheless, the four-Justice dissent concluded that remand after denial of substitution would exceed the Court's Article III jurisdiction. *Id.* at 441. The four-Justice plurality concluded that the Attorney General's removal of the case on his certification raises significant and substantive federal questions at the outset, so that it is consistent with Article III for the court to retain jurisdiction "once it has invested time and resources on the initial scope-of-employment contest." *Id.* at 436. Justice O'Conner declined to address the Article III question because it was not presented in the case before the Court. *Id.* at 437.

In summary, the clarity of the statute's language prohibiting remand is not in dispute. The only "split" among the Justices, the courts, and even these parties regarding remand after denial of substitution, concerns the applicability of Article III to such a procedure. These parties further appear to agree that this is *not* an ideal case for the Court to review the Article III question, *if* the Court concludes that colorable federal questions remain to be decided by the district court. Finally, the parties have never briefed the merits of the Article III question in these proceedings at any level, and accordingly the Sixth Circuit did not directly address the subject in its Opinion.

CONCLUSION

For the reasons stated above, these Respondents cannot agree with the United States that the Court should review the Petitioner's first issue, which posits an "incident-denying" certification, because this is not merely an "incident-denying" case. Rather, this case involves the district court's failure to determine facts and hear legal arguments relative to the characterization and effect of the defendant's alleged conduct, under Kentucky law defining "scope of employment."

These Respondents further contend the Court should not review Petitioner's second question either, because retaining federal jurisdiction under these circumstances would not raise unavoidable constitutional concerns. Rather, the "ideal vehicle" for resolving such issues would be a case of rape, assault, or harassment, not colorably within the scope of employment under applicable state law, so that no federal question would arguably be raised from the outset. However, if the Court undertakes review of the district court's denial of substitution, then these Respondents must reluctantly agree with the United States that, for practical reasons, the Court should review the issue of remand as well.

Respectfully submitted,

C. THOMAS MILLER
J. DUNCAN PITCHFORD
WHITLOW, ROBERTS, HOUSTON & STRAUB, PLLC

March 2006

APPENDIX A

COMMONWEALTH OF KENTUCKY
TRIGG CIRCUIT COURT
CIVIL ACTION NO. 03-CI-00119

Pat Osborn — PLAINTIFF

v.

Barry Haley, individually — DEFENDANTS
Gaye Luber
Land Between The Lakes Association, Inc.

(Filed Jun. 23, 2003)

Comes now the plaintiff, Pat Osborn, and for her complaint herein states as follows:

PARTIES AND JURISDICTION

1. Plaintiff, Pat Osborn, is a resident of Calloway County, Kentucky.

2. Defendant, Barry Haley, is believed to be a resident of Marshall County, Kentucky.

3. Defendant, Gaye Luber, is a resident of Marshall County, Kentucky.

4. Defendant, Land Between The Lakes Association, Inc. (hereinafter referred to as "LBLA") is a Kentucky corporation with its principal place of business located in Trigg County, Kentucky.

5. The acts of the defendants that are the basis of this complaint occurred in Trigg County, Kentucky.

6. At all times relevant to this complaint, defendant Barry Haley was employed as Business Manager by USDA Forest Service, Land Between The Lakes National Recreation Area (LBL NRA, hereinafter referred to as "U.S. Forest Service"), whose principal place of business is located at 100 Van Morgan Drive, Golden Pond, Trigg County, Kentucky.

7. At all times relevant to this complaint, defendant Gaye Luber was employed as Executive Director by defendant LBLA, whose principal place of business is located at 345 Maintenance Road, Golden Pond, Trigg County, Kentucky.

8. Plaintiff was employed as Volunteer Coordinator by defendant LBLA from January 2001 until her discharge on June 19, 2002. Plaintiff worked at defendant LBLA's principal place of business located at 345 Maintenance Road, Golden Pond, Trigg County, Kentucky.

9. LBLA is a corporate contractor to the U.S. Forest service. LBLA provides staff for gift shops, visitor centers, and interpretive areas. LBLA receives more than one-half of its income from the U.S. Forest Service.

10. On or near February 7, 2002, and again upon re-advertisement of the position on or near April 19, 2002, plaintiff applied for an advertised position of Contract Specialist Trainee with the U.S. Forest Service. The chosen applicant would be trained out of the U.S. Forest Service office located in Trigg County, Kentucky.

11. On or near May 20, 2002, at a joint meeting of U.S. Forest Service, LBLA, and Brown & Root employees, defendant Barry Haley revealed the name of the person he had selected for the position of Contract Specialist Trainee with the U.S. Forest Service. The person Barry Haley selected was someone other than the plaintiff.

12. Plaintiff is a veteran of the armed services, having served on active duty in the United States Air Force from 1975 until her honorable discharge in 1979. She also served reserve duty from 1981 until her retirement in 1999.

13. As an honorably discharged "5-Point Preference-Eligible" veteran, plaintiff was entitled to receive preference points when being considered for the Contract Specialist Trainee position with the U.S. Forest Service.

14. On or near June 11, 2002, plaintiff filed a written veterans' preference inquiry with the United States Department of Labor in order to determine if she had received the veterans' preference points to which she was entitled when being considered as an applicant for the Contract Specialist Trainee position with the U.S. Forest Service.

15. On June 17, 2002, plaintiff was contacted by telephone by Mr. Robert Kuenzli, an investigator with the United States Department of Labor, and interviewed regarding the written veterans' preference inquiry filed by the plaintiff with the United States Department of Labor.

16. During plaintiff's conversation with Mr. Kuenzli on June 17, 2002, Mr. Kuenzli asked plaintiff whom he could contact at the U.S. Forest Service to determine if plaintiff had received her veterans' preference points when being considered for the position. Plaintiff told Mr. Kuenzli that defendant Barry Haley should be contacted, and provided his phone number. Plaintiff also stated to Mr. Kuenzli that if defendant Barry Haley found out that plaintiff had filed a veterans' preference inquiry with the U.S. Department of Labor, there was a good chance defendant Barry Haley would cause plaintiff to lose her job.

17. On June 17, 2002, after his conversation with plaintiff, Mr. Kuenzli contacted defendant Barry Haley by telephone. While investigating the award of veterans' preference points to applicants in the hiring process for the Contact Specialist Trainee, at defendant Barry Haley's insistence, Mr. Kuenzli acknowledged that plaintiff had filed a written veterans' preference inquiry with the Department of Labor.

18. On June 17, 2002, after Mr. Kuenzli disclosed to defendant Barry Haley that plaintiff had filed a written veterans' preference inquiry with the U.S. Department of Labor, the Executive Director of defendant LBLA, defendant Gaye Luber, summoned plaintiff into her office at LBLA. Defendant Gaye Luber proceeded to ask plaintiff to apologize to defendant Barry Haley for "not being a good Forest Service partner".

19. Plaintiff informed defendant Gaye Luber that Plaintiff had spoken with Mr. Bob Kuenzli of the U.S. Department of Labor earlier that day (June 17, 2002), that plaintiff knew what defendant Gaye Luber wanted plaintiff to apologize for, and that plaintiff would not apologize to Barry Haley for exercising plaintiff's right to inquire as to whether she was given consideration for her veteran status.

20. On June 19, 2002, plaintiff was discharged from her employment with LBLA by defendant Gaye Luber. Plaintiff attempted to telephone Mr. Kuenzli to report that she was being fired for filing the veterans' preference inquiry, but was physically thwarted by defendant Gaye Luber. Plaintiff was ordered to empty her desk of personal belongings in the presence of defendant Gaye Luber. Then plaintiff was escorted from the LBLA premises by defendant Gaye Luber.

FIRST CAUSE OF ACTION
DISCHARGE OF PLAINTIFF IN VIOLATION OF PUBLIC POLICY OF STATE OF KENTUCKY

21. Plaintiff incorporates by reference paragraphs 1-20, inclusive, of this complaint as if fully set forth here.

22. Plaintiff's discharge from her employment with LBLA by its Executive Director, defendant Gaye Luber, was wrongful, in violation of the public policy of the state of Kentucky. Plaintiff's discharge by defendant Gaye Luber, was in retaliation for plaintiff exercising her right to file a formal inquiry request

with the U.S. Department of Labor inquiring as to whether plaintiff was given credit for her veteran status when being considered for the Contract Specialist Trainee position with the U.S. Forest Service.

23. As a direct, foreseeable, and proximate result of plaintiff's wrongful discharge by defendant Gaye Luber, plaintiff has lost and will continue to lose income and benefits, and has suffered and will continue to suffer humiliation, embarrassment, mental and emotional distress all to plaintiff's damage, in an amount in excess of the dollar amount necessary to establish the jurisdiction of this court.

24. As Executive Director of defendant LBLA, defendant Gaye Luber was acting within the scope of her employment duties with defendant LBLA. Her tortious conduct is therefore imputable to defendant LBLA under the doctrine of respondent superior, and defendant LBLA is liable for the damages caused to plaintiff by the conduct of defendant Gaye Luber.

25. Because the acts taken toward plaintiff by defendant Gaye Luber were carried out in a malicious, oppressive, and intentional manner in order to injure and damage plaintiff, plaintiff requests the assessment of punitive damages against defendant Gaye Luber in an amount to punish and make an example of defendant Gaye Luber.

26. Because the malicious, oppressive, and intentional conduct of defendant Gaye Luber was committed when acting within the scope

of her employment as Executive Director of defendant LBLA, her conduct is therefore imputable to LBLA under the doctrine of respondent superior, and plaintiff requests the assessment of punitive damages against defendant LBLA.

SECOND CAUSE OF ACTION
INTERFERENCE WITH
EMPLOYMENT RELATIONSHIP

27. Plaintiff incorporates by reference paragraphs 1-26, inclusive, of this complaint as if fully set forth here.

28. Defendant Barry Haley knew of the employment relationship between plaintiff and defendant, LBLA.

29. On or near June 17, 2002, defendant Barry Haley intentionally interfered with plaintiff's employment relationship with defendant LBLA. Plaintiff incurred the enmity of defendant Barry Haley by filing a veterans' preference inquiry with the U.S. Department of Labor, thereby causing an investigation into Barry Haley's hiring practices at the U.S. Forest Service. Acting outside the scope of his employment, defendant Barry Haley wrongfully and maliciously induced, persuaded, or coerced defendant Gaye Luber to discharge plaintiff from her job with defendant LBLA in retaliation for plaintiff filing a veterans' preference inquiry.

30. As a direct foreseeable, and proximate result of the conduct of defendant Barry Haley, plaintiff has lost and will continue to lose income and benefits, and has suffered and

will continue to suffer humiliation, embarrassment, mental and emotional distress all to the plaintiff's damage in an amount in excess of the dollar amount necessary to establish the jurisdiction of this court.

31. Because the acts taken toward plaintiff by defendant Barry Haley were carried out in a malicious, oppressive, and intentional manner in order to injure and damage plaintiff, plaintiff requests the assessment of punitive damages against defendant Barry Haley in an amount to punish and make an example of defendant Barry Haley.

THIRD CAUSE OF ACTION
CONSPIRACY TO WRONGFULLY DISCHARGE PLAINTIFF

32. Plaintiff incorporates by reference paragraphs 1-31, inclusive, of this complaint as if fully set forth here.

33. Commencing on or near June 17, 2002, defendant Barry Haley and defendant Gaye Luber maliciously, without just cause, conspired to bring about plaintiff's discharge from her employment with defendant LBLA in retaliation for plaintiff filing a veterans preference inquiry with the U.S. Department of Labor.

34. In furtherance of the conspiracy:

    a. On or near June 17, 2002, acting outside the scope of his employment, defendant Barry Haley did wrongfully and maliciously induce, persuade, or

coerce defendant Gaye Luber to discharge plaintiff from employment with defendant LBLA.

b. On or near June 19, 2002, acting in concert with defendant Barry Haley, defendant Gaye Luber discharged plaintiff from her job with defendant LBLA in violation of the public policy of the State of Kentucky.

35. As a direct, foreseeable, and proximate result of this conspiracy by defendants Barry Haley and Gaye Luber, plaintiff has lost and will continue to lose income and benefits, has suffered and will continue to suffer humiliation, embarrassment, mental and emotional distress all to plaintiff's damage in an amount in excess of the dollar amount necessary to establish the jurisdiction of this court.

36. Because the acts taken toward plaintiff by defendants Barry Haley and Gaye Luber were carried out in a malicious, oppressive, and intentional manner in order to injure and damage plaintiff, plaintiff requests the assessment of punitive damages against defendants Barry Haley and Gaye Luber in an amount to punish and make an example of defendants Barry Haley and Gaye Luber.

37. As Executive Director of defendant LBLA, defendant Gaye Luber was acting within the scope of her employment duties with defendant LBLA. Her tortious conduct is therefore imputable to defendant LBLA under the doctrine of respondent superior, and defendant LBLA is liable to plaintiff for the damages

caused to plaintiff by the conduct of defendant Gaye Luber.

38. Because the malicious, oppressive and intentional conduct of defendant Gaye Luber was committed when acting within the scope of her employment as Executive Director of defendant LBLA, plaintiff requests the assessment of punitive damages against defendant LBLA under the doctrine of respondent superior.

FOURTH CAUSE OF ACTION
CONSPIRACY TO INTERFERE WITH PLAINTIFF'S EMPLOYMENT RELATIONSHIP

39. Plaintiff incorporates by reference paragraphs 1-38, inclusive, of this complaint as if fully set forth here.

40. On or near June 17, 2002, defendants Barry Haley and Gaye Luber maliciously, without just cause, conspired to interfere with plaintiff's employment relationship with LBLA and bring about plaintiff's discharge.

41. In furtherance of the conspiracy defendant Barry Haley, acting outside the scope of his employment wrongfully and maliciously induced, persuaded, or coerced defendant Gaye Luber to discharge plaintiff from her job with LBLA in retaliation for plaintiff filing a veterans' preference inquiry. Acting in concert with defendant Barry Haley, and in furtherance of the conspiracy, defendant Gaye Luber discharged plaintiff from her employment with LBLA.

42. As a direct, foreseeable, and proximate result of this conspiracy by defendants Barry Haley and Gaye Luber, plaintiff has lost and will continue to lose income and benefits, has suffered and will continue to suffer humiliation, embarrassment, mental and emotional distress all to plaintiff's damage in an amount in excess of the dollar amount necessary to establish the jurisdiction of this court.

43. Because the acts taken toward plaintiff by defendants Barry Haley and Gaye Luber were carried out in a malicious, oppressive, and intentional manner in order to injure and damage plaintiff, plaintiff requests the assessment of punitive damages against defendants Barry Haley and Gaye Luber in an amount to punish and make an example of defendant's [sic] Barry Haley and Gaye Luber.

44. As Executive Director of defendant LBLA, defendant Gaye Luber was acting within the scope of her employment duties with defendant LBLA. Her tortious conduct is therefore imputable to defendant LBLA under the doctrine of respondent superior, and defendant LBLA is liable to plaintiff for the damages caused to plaintiff by the conduct of defendant Gaye Luber.

45. Because the malicious, oppressive and intentional conduct of defendant Gaye Luber was committed when acting within the scope of her employment as Executive Director of LBLA plaintiff requests that punitive damages be assessed against defendant LBLA under the doctrine of respondent superior.

FIFTH CAUSE OF ACTION
OUTRAGEOUS CONDUCT

46. Plaintiff incorporates by reference paragraphs 1-45, inclusive, of this complaint as if fully set forth here.

47. Defendants Barry Haley and Gaye Luber's conduct directed toward plaintiff as described in this complaint was committed in an intentional or reckless manner.

48. Defendants Barry Haley and Gaye Luber's conduct was outrageous and intolerable because it offended generally accepted standards of decency and morality.

49. The conduct of defendants Barry Haley and Gaye Luber, as described in this complaint, was malicious, oppressive and intended to injure plaintiff.

50. The conduct of defendants Barry Haley and Gaye Luber as described in this complaint has caused plaintiff to suffer severe emotional distress to plaintiff's damage in an amount in excess of the dollar amount necessary to establish the jurisdiction of this court.

51. Because the acts taken toward plaintiff by defendant's [sic] Barry Haley and Gaye Luber were carried out in a malicious, oppressive, and intentional manner in order to injure and damage plaintiff, plaintiff requests the assessment of punitive damages against defendant's [sic] Barry Haley and Gaye Luber in an amount to punish and make an example of these defendants.

52. As Executive Director of defendant LBLA, defendant Gaye Luber was acting within the scope of her employment duties with defendant LBLA. Her tortious conduct is therefore imputable to defendant LBLA under the doctrine of respondent superior, and defendant LBLA is liable to plaintiff for the damages caused to plaintiff by the conduct of defendant Gaye Luber.

53. Because the malicious, oppressive and intentional conduct of defendant Gaye Luber was committed when acting within the scope of her employment as Executive Director of LBLA, plaintiff requests that punitive damages be assessed against defendant LBLA under the doctrine of respondent superior.

SIXTH CAUSE OF ACTION
CONSPIRACY - OUTRAGEOUS CONDUCT

54. Plaintiff incorporates by reference paragraphs 1-53, inclusive, of this complaint as if fully set forth here.

55. Acting in concert, defendants Barry Haley and Gaye Luber directed their conduct, as described in this complaint, toward plaintiff in an intentional or reckless manner.

56. The conduct of defendants Barry Haley and Gaye Luber, in causing plaintiff's discharge from her employment in retaliation for plaintiff exercising her right to file a veterans' preference inquiry, was outrageous and intolerable because it offended generally accepted standards of decency and morality.

57. Defendants Barry Haley and Gaye Luber's conduct as described in this complaint was malicious, oppressive and intended to injure plaintiff.

58. The conduct of defendants Barry Haley and Gaye Luber has caused plaintiff to suffer severe emotional distress to plaintiff's damage in an amount in excess of the dollar amount necessary to establish the jurisdiction of this court.

59. Because the acts taken toward plaintiff by defendants Barry Haley and Gaye Luber were carried out in a malicious, oppressive, and intentional manner in order to injure and damage plaintiff, plaintiff requests the assessment of punitive damages against defendant's [sic] Barry Haley and Gaye Luber in an amount to punish and make an example of these defendants.

60. As Executive Director of defendant LBLA, defendant Gaye Luber was acting within the scope of her employment duties with defendant LBLA. Her tortious conduct is therefore imputable to defendant LBLA under the doctrine of respondent superior, and defendant LBLA is liable to plaintiff for the damages caused to plaintiff by the conduct of defendant Gaye Luber.

61. Because the malicious, oppressive and intentional conduct of defendant Gaye Luber was committed when acting within the scope of her employment as Executive Director of LBLA, plaintiff requests that punitive damages be assessed against defendant LBLA under the doctrine of respondent superior.

WHEREFORE, plaintiff requests judgment against defendants Barry Haley, Gaye Luber, and LBLA, and each of them, as requested above in this complaint, to wit:

1. For compensatory damages, including lost wages, lost employee benefits, vacation benefits, mental and emotional distress and other special and general damages according to proof.

2. For an award of punitive damages against each of the defendants as requested above in this complaint.

3. For an award of costs of suit incurred on all causes of action.

4. For an award to plaintiff of such other and further relief as this court deems just and proper.

Plaintiff hereby demands a trial by jury upon all the issues in the above-entitled action.

/s/ Pat Osborn
Pat Osborn
1474 Paschall Road
Murray, KY 42071
(270) 492-8256
PLAINTIFF, PRO SE

June 11, 2003
Date

I hereby certify the foregoing to be a true copy as filed in the Office of the Trigg Circuit Clerk.

Witness my hand and seal this 30th day of July 2003
Pam W. Perry, Clerk
Trigg Circuit/District Courts

By: [Illegible] D.C.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

PAT OSBORN — PLAINTIFF

v. — CIVIL ACTION NO. 5:03-CV-00192-R

BARRY HALEY, Individually
GAYE LUBER
LAND BETWEEN THE LAKES
ASSOCIATION, INC. — DEFENDANTS

ANSWER

The United States of America, by counsel, states as follows in response to plaintiff's complaint:

ANSWERS TO NUMBERED PARAGRAPHS OF THE COMPLAINT

Parties and Jurisdiction

1. The federal defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 1, 15, 16, 18, 19, and 20. To the extent a response to any of said paragraphs is deemed required, the allegations are denied.

2. The federal defendant admits the allegations in paragraphs 2, 3, 6, 7, 8, 11, 12, 13 and 14.

3. With regard to paragraph 4, the federal defendant admits that the Land Between the Lakes Association, Inc. ("LBLA") has its principal place of business in Trigg County, Kentucky. The federal defendant is without knowledge or information sufficient to form a belief as to

whether LBLA is a Kentucky corporation. In its answer, LBLA stated it is not a Kentucky corporation.

4. With regard to paragraph 5, the federal defendant admits that plaintiff alleges that certain actions occurred in Trigg County, Kentucky. The remainder of the allegations in said paragraph are denied.

5. The federal defendant denies the allegations in the first sentence of paragraph 9. The remainder of the allegations in said paragraph are admitted.

6. The allegations in paragraph 10 are admitted, except that the federal defendant denies that a position was re-advertised.

7. The federal defendant admits the allegations in the first sentence of paragraph 17. With respect to the second sentence, the federal defendant admits that Mr. Kuenzli advised that plaintiff filed a written veterans' preference inquiry with the Department of Labor. All remaining allegations in paragraph 17 are denied.

First Cause of Action

8. Paragraph 21 is a restatement of prior allegations, which are answered above. To the extent a response is deemed required, the allegations are again denied.

9. The federal defendant denies the allegations in paragraphs 22, 23, and 26.

10. The federal defendant denies the allegations in paragraph 24, except that it appears that defendant Luber was acting within the scope of her employment when she discharged plaintiff.

11. The allegations in paragraph 25 constitute a prayer for relief, to which no response is required. To the extent a response is deemed required, the federal defendant denies the allegations.

Second Cause of Action

12. Paragraph 27 is a restatement of prior allegations, which are answered above. To the extent a response is deemed required, the allegations are again denied.

13. The federal defendant denies the allegation in paragraph 28 on the basis that "employment relationship" is vague and ambiguous. The federal defendant admits that it knew plaintiff was an employee of LBLA.

14. The federal defendant denies the allegations in paragraphs 29, 30, and 31.

Third Cause of Action

15. Paragraph 32 is a restatement of prior allegations, which are answered above. To the extent a response is deemed required, the allegations are again denied.

16. The federal defendant denies the allegations in paragraphs 33, 34, 35, 36 and 37.

17. The allegations in paragraph 38 constitute a prayer for relief, to which no response is required. To the extent a response is deemed required, the federal defendant denies the allegations.

Fourth Cause of Action

18. Paragraph 39 is a restatement of prior allegations, which are answered above. To the extent a response is deemed required, the allegations are again denied.

19. The federal defendant denies the allegations in paragraphs 40, 41, 42, 43, and 44.

20. The allegations in paragraph 45 constitute a prayer for relief, to which no response is required. To the extent a response is deemed required, the federal defendant denies the allegations.

Fifth Cause of Action

21. Paragraph 46 is a restatement of prior allegations, which ar answered above. To the extent a response is deemed required, the allegations are again denied.

22. The federal defendant denies the allegations in paragraphs 47, 48, 49, 50, 51, and 52.

23. The allegations in paragraph 53 constitute a prayer for relief, to which no response is required. To the extent a response is deemed required, the federal defendant denies the allegations.

Sixth Cause of Action

24. Paragraph 54 is a restatement of prior allegations, which are answered above. To the extent a response is deemed required, the allegations are again denied.

25. The federal defendant denies the allegations in paragraphs 55, 56, 57, 58, 59, and 60.

26. The allegations in paragraph 61 constitute a prayer for relief, to which no response is required. To the extent a response is deemed required, the federal defendant denies the allegations.

AFFIRMATIVE DEFENSES

1. The complaint fails to state in whole or in part a claim upon which relief may be granted.

2. The court lacks jurisdiction because the alleged causes of action do not arise under the Constitution, law or treaties of the United States.

3. Plaintiff's claims are barred in whole or in part by the applicable statutes of limitation.

4. The court lacks jurisdiction because plaintiff failed to exhaust administrative remedies before filing suit.

5. Service of process on the United States and its employee Barry Haley is insufficient pursuant to Fed. R. Civ. P. 4(i)(2)(A) and (B).

6. All or some of the claims against federal defendant Barry Haley allege violations of state law to which defendant Haley has absolute immunity, and accordingly the United States must be substituted as the proper party defendant as to said claims pursuant to 28 U.S.C. §§ 2679(b)(1) and 2679(d).

7. To the extent the claims against federal defendant Barry Haley are determined to properly allege violations of federal law or the Constitution of the Untied States, federal defendant Barry Haley is entitled to qualified immunity from said claims.

8. The United States reserves the right to plead and prove additional defenses and affirmative defenses as they become known during discovery and litigation.

WHEREFORE, based on all of the foregoing, the United States requests:

1. That plaintiff's complaint be DISMISSED;

2. That all costs be assessed against plaintiff; and

3. Such other relief as the Court deems just and proper.

Respectfully submitted,

MARK L. MILLER
United States Attorney

/s/ W. Brady Miller
W. Brady Miller
Assistant U.S. Attorney
510 W. Broadway,
10th Floor
Louisville, KY 40202
(502) 582-5166

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 19th day of November, 2003, to the following:

Pat Osborn, Plaintiff Pro Se
1474 Paschall Road
Murray, Kentucky 42071

C. Thomas Miller, Esq.
Whitlow, Roberts, Houston & Straub
300 Broadway, P.O. Box 995
Paducah, Kentucky 42002

/s/ W. Brady Miller
W. Brady Miller
Assistant U.S. Attorney

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

PAT OSBORN — PLAINTIFF

v. CIVIL ACTION NO. _____

BARRY HALEY, INDIVIDUALLY
GAYE LUBER
LAND BETWEEN THE
LAKES ASSOCIATION, INC. — DEFENDANTS

CERTIFICATION

I, Monica Wheatley, Acting United States Attorney, Western District of Kentucky, acting pursuant to the provisions of 28 U.S.C. § 2679(d)(2), and by virtue of the authority vested in me by the Appendix to 28 C.F.R. § 15.3 (1990), hereby certify that the Office of the United States Attorney has reviewed the available facts in this matter. On the basis of the information now available to me with respect to the allegations in the complaint, I find that the named federal defendant, Barry Haley, was acting within the scope of his employment with the U.S. Forest Service, at the time of the conduct alleged in the complaint.

/s/ Monica Wheatley
MONICA WHEATLEY
Acting United States Attorney

Aug. 20, 2003
DATE

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

PAT OSBORN — PLAINTIFF

v. — CIVIL ACTION NO. 5:03-CV-00192-R

BARRY HALEY, Individually
GAYE LUBER
LAND BETWEEN THE
LAKES ASSOCIATION, INC. — DEFENDANTS

UNITED STATES' MOTION TO DISMISS

The United States moves the court to dismiss the above-styled case as against the federal defendant. In support thereof, the United States submits the following memorandum of law.

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO DISMISS

INTRODUCTION

Plaintiff filed a complaint in this court against defendants Barry Haley, Gaye Luber and the Land Between the Lakes Association, Inc. ("LBLA"), alleging various causes of action related to her discharge from employment at LBLA in June 2002. These causes of action include: interference with employment relationship; conspiracy to wrongfully discharge plaintiff; conspiracy to interfere with employment relationship; outrageous conduct; and conspiracy to commit outrageous conduct. See Complaint, causes of action two through six. All of the foregoing causes of action naming Barry Haley purport to allege state law torts.

ARGUMENT

I. THE UNITED STATES IS THE PROPER DEFENDANT AS TO STATE LAW CLAIMS AGAINST A FEDERAL EMPLOYEE.

Section 6 of the Federal Employees Liability Reform and Tort Compensation Act provides that upon certification by the Attorney General, or his designate, that a federal employee was acting within the scope of his office or employment at the time of the incident out of which a state law claim arises, any civil action arising out of the incident shall be deemed an action against the United States, and the United States of America shall be substituted as sole defendant with respect to those claims. 28 U.S.C. § 2679(d)(1),(2).

As noted above, all of the causes of action plaintiff claims against Forest Service employee Barry Haley sound in tort under state law. Acting U.S. Attorney Monica Wheatley has certified that Forest Service employee Barry Haley acted within the scope of his employment at the time of the conduct alleged in the complaint. The United States has accordingly separately filed a Notice of Proposed Substitution herein to substitute the United States as defendant in this action in place of Forest Service employee Barry Haley.

II. THE UNITED STATES IS IMMUNE FROM SUIT EXCEPT AS IT CONSENTS TO BE SUED.

The United States, as sovereign, is immune from suit except under those circumstances in which it consents to be sued, and the terms of that consent define the court's jurisdiction to entertain the suit. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Sherwood*, 312

U.S. 584, 586 (1941); *United States v. Dalm*, 494 U.S. 596, *reh'g denied*, 495 U.S. 941 (1990). Where no such consent exists, a district court has no jurisdiction to entertain a suit against the [United States.] *Mitchell*, 445 U.S. at 538.

In short, any waiver of sovereign immunity must be strictly construed in favor of the United States. *Library of Congress v. Shaw* 478 U.S. 310, 318 (1986); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-686 (1983). The Supreme Court has long held that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S. Ct. 2698, 2702 (1981); *Soriano v. United States*, 352 U.S. 270, 276, 77 S. Ct. 269, 273 (1957); *see also United States v. Kubrick*, 444 U.S. 111, 117-118, 100 S. Ct. 352, 357 (1979); *Munro v. United States*, 303 U.S. 36, 41, 58 S. Ct. 421, 423-424 (1938); *Jaffee v. United States*, 592 F.2d 712 (3rd Cir. 1979), *cert. denied*, 441 U.S. 961, 99 S. Ct. 2406 (1979); *Bledsoe v. Department of Housing Urban Development*, 398 F. Supp. 315, 320 (E.D. Pa. 1975).

Thus, when an action is brought against the United States as to which there has been no waiver of immunity, or where the waiver granted has been conditioned by an exception applicable to that action, the federal court has no jurisdiction.

III. BECAUSE PLAINTIFF FAILED TO EXHAUST HER ADMINISTRATIVE REMEDIES UNDER THE FEDERAL TORT CLAIMS ACT, THE COURT HAS NO JURISDICTION OVER HER TORT CLAIMS AGAINST THE UNITED STATES.

The sole jurisdictional basis for a suit against the United States sounding in tort is the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. ("FTCA"). The FTCA is the exclusive waiver of sovereign immunity for actions sounding in state law tort against the United States, its agencies and/or officers acting within their official capacity. *Gibson v. Matthews*, 715 F. Supp. 181 (E.D. Ky. 1989), *aff'd*, 926 F.2d 532 (6th Cir. 1991). In order to maintain a lawsuit against the United States under the FTCA, a plaintiff must exhaust her administrative remedies before bringing suit. 28 U.S.C. § 2675(a). Only when the claim has been "finally denied by the agency in writing" or when there has been a "failure . . . to make final disposition of a claim within six months after it is filed" may a plaintiff institute an action in federal court. *Id.*

Exhaustion of administrative remedies is a *jurisdictional* prerequisite and cannot be waived. *McAfee v. 5th Circuit Judges*, 884 F.2d 221 (5th Cir. 1989); *Henderson v. United States*, 785 F.2d 121 (4th Cir. 1986); *Jackson v. United States*, 730 F.2d 808 (D.C. Cir. 1984); *Holloman v. Watt*, 708 F.2d 1399 (10th Cir. 1983); *Contemporary Mission, Inc. v. U.S. Postal Service*, 648 F.2d 97 (2nd Cir. 1981); *Garrett v. United States*, 640 F.2d 24 (6th Cir. 1981); *Allen v. United States*, 517 F.2d 1328 (6th Cir. 1975); *Rallis v. M.P.W. Stone*, 821 F. Supp. 466 (E.D. Mich. 1993); *Moody v. United States*, 585 F. Supp. 286 (E.D. Tenn. 1984), *aff'd.*, 774 F.2d 150 (6th Cir. 1985); *Chodos v. F.B.I.*, 559 F. Supp. 69

(S.D.N.Y. 1982) *aff'd.*, 697 F.2d 289 (2nd Cir. 1982). The Federal Tort Claims Act is a specific congressional exception to sovereign immunity allowing the government to be sued for tortious acts committed by its employees. *Suarez v. United States*, 22 F.3d 1064 (11th Cir. 1994). The circumstances of its waiver must be scrupulously observed and may not be expanded by the courts. *See, e.g., United States v. Kubrick, supra.*

Plaintiff filed no FTCA claim with the Forest Service. Because plaintiff has not presented a claim to the agency, the agency has not "finally denied" the claim, nor has it failed to make final disposition of same. 28 U.S.C. § 2675(a). Thus, plaintiff has not exhausted her administrative remedies, and the Court has no jurisdiction over her tort claims against the United States, and accordingly should dismiss them.

CONCLUSION

Based upon all of the foregoing, the United States respectfully requests that the court grant its motion to dismiss the above-styled action.

Respectfully submitted,

DAVID L. HUBER
United States Attorney

/s/ W. Brady Miller

W. Brady Miller
Assistant U.S. Attorney
510 W. Broadway, 10th Floor
Louisville, KY 40202
(502) 582-5166

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 9th day of January, 2004, to the following:

Pat Osborn, Plaintiff Pro Se
1474 Paschall Road
Murray, Kentucky 42071

C. Thomas Miller, Esq.
Whitlow, Roberts, Houston & Straub
300 Broadway, P.O. Box 995
Paducah, Kentucky 42002

/s/ W. Brady Miller
W. Brady Miller
Assistant U.S. Attorney

APPENDIX E

U.S. Department of Labor

Robert A. Kuenzli
Office of the Assistant Secretary
for Veterans Employment
and Training
320 Garrard Street
Covington, KY 41011
(859) 292-6666 Ext. 253
(859) 292-6708 Fax
E-mail: kuenzli-robert@dol.gov

[LOGO]

June 24, 2002

RAVET William J. Bolls, Jr.
Veterans' Employment and Training Service
U.S. Department of Labor
Sam Nunn Atlanta Federal Center
61 Forsyth Street, S.W., Room 6-T85
Atlanta, Georgia 30303

Re: Patricia Osborn
04-KY-2002-00003-VP

Dear RAVET Bolls:

This is a follow-up letter to our telephone conversation concerning the termination of the above mentioned veteran after I discussed the hiring procedures on Recruitment Notice No.: R860-002-D-02 with the U.S. Department of Agriculture (U.S. Forest Service) for a Contract Specialist Trainee, with Mr. Barry Haley, Business Manager, at Land Between the Lake Recreation Area.

Ms. Osborn worked for the Land Between The Lakes Association (LBLA), which is a partner with the U.S. Forest Service at Land Between The Lakes Recreation Area, as a paid volunteer coordinator.

Ms. Osborn is a 5-point preference veteran and with her experience with Land Between The Lakes and her preference she thought she would be a good chance to be selected for the opening. She applied for the position and on May 20, 2002, she learned she was not selected during a staff meeting with nearly 80 of her peers. Mr. Haley announced at the meeting who was hired. Ms. Osborn was shocked that she would learn that she was not hired in front of her friends and peers without some type of prior notice.

After the announcement Mr. Haley asked if there was any question and Ms. Osborn asked Mr. Haley if it would not have been better to provide her with a letter or phone call prior to announcing her non-selection in front of the whole staff. She states that he agreed that it would have been better.

Later during the staff meeting Mr. Haley was talking about the lack of use for a card system that he designed for employees to provide a Think Card to any employee that they observe doing something incorrectly. This Think Card is suppose to remind that employee not to make the same mistake again. After the talk about the card system, Mr. Haley again asked if there were any questions and Ms. Osborn asked Mr. Haley if he had a Think Card, this caused the group at the staff meeting to have a big laugh.

About a week after the staff meeting incident Ms. Osborn's boss, Ms. Tamara Newkum asked Ms. Osborn to apologize to Mr. Haley for the comment he made at the staff meeting and Ms. Osborn told her boss that she would not apologize to Mr. Haley.

I spoke to Mr. Haley on Monday, June 17, to discuss the position that they filled and was told that the number one person on the cert accepted the position. He continued by

saying that he would have his HR fax a copy of the cert to my office.

After receiving the fax I called Ms. Osborn and explained that it appeared that the posting was handled correctly. Ms. Osborn asked that her complaint be closed.

Later Monday afternoon Ms. Osborn called to tell me that she thinks she may be in trouble with her boss because she received a call from Ms. Newkum telling her to cancel the next days appointments and to meet with her in her office the first thing in the morning.

Tuesday morning Ms. Osborn called me to say that she had been fired and that her boss said that Mr. Haley had demanded Ms. Newkum terminate her for insubordination.

I asked Ms. Osborn what it was that caused the insubordination and she explained that it was the comment she made at the staff meeting to Mr. Haley. Ms. Osborn said that Ms. Newkum didn't want to fire her but that she was told do so.

Ms. Osborn told me later that her evaluations are always raving and that she had never been in trouble. She said that she didn't even get any type of warning for the comment that she maid [sic] in the staff meeting. I told Ms. Osborn that I would make some phone calls and get back with her.

Ms. Osborn told me in her initial complaint that Mr. Haley runs the organization as he sees fit and that he proclaims himself to be "The Master" of hardball who will not be intimidated. Another fact that may assist in this is that Mr. Haley and Ms. Newkum are a [sic] item which is well known at the recreation area. Is this how Mr. Haley forced Ms. Newkum to terminate Ms. Osborn?

There are a lot of unanswered questions here but there is one sure fact, Ms. Osborn is single and out of work. The reason is due to her claim with our agency to determine if her veterans preference rights were violated. My phone call to Mr. Haley caused Ms. Osborn to loose [sic] her job. Now I need some assistance in correcting a situation that I assisted in causing.

I have made numerous phone calls trying to find an agency that might be able to assist Ms. Osborn in this matter and everyone is telling me the same thing, that they can not assist. The VEOA statute does not provide any relief for retaliation and it appears that VETS's hands are tied in a matter such as this.

I know that Ms. Osborn can hire an attorney but keep in mind that she is single and the position she held with LBLA paid very little. Do you have any suggestions that will asset [sic] in correcting this mis-justice?

Please let me know if you have any questions or concerns regarding this situation. Thank you for your time and consideration on this matter.

Sincerely,

Robert A. Kuenzli
Assistant Director

CC: File

Supreme Court, U.S.
FILED
APR 6 - 2006
OFFICE OF THE CLERK

4

No. 05-593

In the Supreme Court of the United States

PAT OSBORN

Petitioner

v.

BARRY HALEY; GAYE LUBER; AND
LAND BETWEEN THE LAKES ASSOCIATION, INC.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION FILED BY NON-FEDERAL RESPONDENTS

ERIC GRANT
ATTORNEY AT LAW
Suite 100
8001 Folsom Boulevard
Sacramento, California 95826
(916) 388-0833

Counsel for Petitioner

QUESTIONS PRESENTED

When a federal employee is sued in a civil action in a state court, the Westfall Act, 28 U.S.C. § 2679(d)(2), authorizes the Attorney General to remove the action to federal district court—and seek to substitute the United States as the party defendant in place of the employee—by certifying that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." As the court of appeals expressly acknowledged, this case presents two questions "that have split the circuits" for more than a decade, namely:

1. Whether the Westfall Act authorizes the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident solely by denying that such incident occurred at all.

2. Whether the Westfall Act forbids a district court to remand an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Act.

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION FILED BY NON-FEDERAL RESPONDENTS

Petitioner Ms. Pat Osborn respectfully files this reply to the Brief in Opposition ("BIO") filed by the non-federal respondents, Gaye Luber ("Luber") and Land Between the Lakes Association, Inc. ("LBLA").

ARGUMENT

Both petitioner and the Solicitor General (representing federal respondent Barry Haley) agree that this Court should grant review to resolve two long-standing splits in the courts of appeals concerning the Westfall Act, 28 U.S.C. § 2679. Luber and LBLA—the two non-federal respondents—have filed a brief in opposition, stating that they "cannot agree with the United States that the Court should review" the first question presented. BIO at 15. For three simple reasons, however, this opposition does not detract from the obvious conclusion that the petition should be granted.

1. Luber and LBLA, though nominal respondents, have no concrete legal interest in a proper resolution of the first question presented. Luber and LBLA have no employment relationship with the United States Government and thus no rights under the Westfall Act. As the Solicitor General accurately states, the Act "confers personal immunity on *federal employees* from all common-law tort claims arising out of acts taken within the scope of their employment." Brief for Respondent Barry Haley ("Haley Br.") at 2 (emphasis added). In contrast to petitioner (as plaintiff) and to Haley (a U.S. Forest Service employee), Luber and LBLA have no interest in whether and how federal employees are accorded immunity from tort claims. The federal interest, moreover, is represented by the Solicitor General, who recommends that "the Court should grant review" of the first question presented. *Id.* at 17. (Luber and LBLA concede that if the Court accepts the Solicitor General's recommendation as to the first question, it should grant review of the second question as well. *See* BIO at 15.)

2. Luber and LBLA assert that "[t]he Petition rests upon a mistaken premise," *id.* at 1, and then seek to show that the district court made certain other errors of fact or law as to respondent Haley, *see id.* at 2-7. But the United States took an appeal to the Sixth Circuit on Haley's behalf, raising the issues it deemed proper and prevailing in that court. The Sixth Circuit, of course, took a view of the record starkly different from that portrayed by the brief in opposition. *Compare* Pet. App. 3a ("[T]he United States conceded that if Haley induced [petitioner's] firing, he acted outside the scope of his employment."), *with* BIO at 1 ("The United States has ***not*** conceded that its employee's alleged conduct was outside the scope of his employment if it occurred." (emphasis added)). The record as characterized by the court of appeals—not by parties having no interest in the issues—ought to frame this Court's consideration of questions presented on certiorari. Here, two questions "that have split the circuits" for quite some time, Pet. App. 2a, are squarely presented by the record as understood by both lower courts.

3. Luber and LBLA impugn the Solicitor General's recognition of "the circuit conflict on the first question presented" (Haley Br. at 18) on the theory that a "[r]emand of this case to the district court for a hearing on the scope of employment issue is consistent with *McHugh* and *Wood*." BIO at 10 (referring to *McHugh v. University of Vermont*, 966 F.2d 67 (2d Cir. 1992), and *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993) (en banc)). The only flaw in this argument is that both of the courts below concluded otherwise. The district court opined that "the *Wood* majority has the better of the interpretive dispute surrounding Westfall Act certifications"; on that basis, the court *refused* to hold a hearing on the scope-of-employment issue. Pet. App. 15a. In reversing that refusal and ordering a hearing, the Sixth Circuit ruled that "the district court erred in relying on the First Circuit's decision in *Wood*," Pet. App. 8a, and so the court of appeals sided with those decisions that "expressly or impliedly reject the *Wood* majority's [and *McHugh*'s] approach," Pet. App. 7a.

In short, everyone but Luber and LBLA—who have no concrete interest in the federal issues—acknowledges the reality of a circuit conflict here. The court below recognized it, and both petitioner and the Solicitor General (on behalf of the sole federal respondent) agree that certiorari should be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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April 2006

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No. 05-593

In the Supreme Court of the United States

PAT OSBORN

Petitioner

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LAND BETWEEN THE LAKES ASSOCIATION, INC.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

When a federal employee is sued in a civil action in a state court, the Westfall Act, 28 U.S.C. § 2679(d)(2), authorizes the Attorney General to remove the action to federal district court—and seek to substitute the United States as the party defendant in place of the employee—by certifying that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." As the court of appeals expressly acknowledged, this case presents two questions "that have split the circuits" for more than a decade, namely:

1. Whether the Westfall Act authorizes the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident solely by denying that such incident occurred at all.

2. Whether the Westfall Act forbids a district court to remand an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Act.

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966 F.2d 67 (2d Cir. 1992) 1

Wood v. United States,
995 F.2d 1122 (1st Cir. 1993) 1

REPLY BRIEF FOR THE PETITIONER

Petitioner Ms. Pat Osborn respectfully files this reply brief in support of her petition for a writ of certiorari.

ARGUMENT

Both petitioner and the Solicitor General of the United States (on behalf of federal respondent Barry Haley) agree that the Court should grant review.* As explained in both the petition (at 6-9, 13-14) and the Solicitor General's brief (at 10-13, 17-18), there are persistent conflicts among multiple circuits as to both questions presented.

As to the first question, the First and Second Circuits take one view of the Attorney General's authority to issue "incident-denying" certifications under the Westfall Act, but the Third, Eighth, and D.C. Circuits (joined in this case by the Sixth Circuit) take a contrary view. While the Solicitor General observes (at 16) that "neither the First nor Second Circuit has revisited the issue in light of the subsequent decisions of the other courts of appeals," that fact only highlights the persistence of the conflict. Indeed, courts in the First and Second Circuits have continued to apply *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993) (Breyer, C.J.) (en banc), and *McHugh v. University of Vermont*, 966 F.2d 67 (2d Cir. 1992), *after* the conflicting decisions from other circuits. *See, e.g., Davric Maine Corp. v. United States Postal Service*, 238 F.3d 58, 66 (1st Cir. 2001) (applying *Wood*); *Day v. Massachusetts Air National Guard*, 167 F.3d 678, 686 (1st Cir. 1999) (same); *Bello v. United States*, 93 Fed. Appx. 288, 289-90 (2d Cir. 2004) (applying *McHugh*); *Asto v. Mirandona*, 372 F. Supp. 2d 702, 707 (E.D.N.Y. 2005) (same).

As to the second question presented, the parties agree that the First and D.C. Circuits take one view of the district court's authority to remand a Westfall Act action to state

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* The two private respondents, Gaye Luber and Land Between the Lakes Association, Inc., each waived the right to file a response to the petition.

court; the Third, Fourth, and Fifth Circuits (joined here by the Sixth Circuit) take a different view; and the Eleventh Circuit takes yet a third view. Although the parties might disagree about how the four dissenting Justices approached the remand issue in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), there can be no dispute that the issue was not definitively resolved in that case, leaving the three-way split described above. *See id.* at 437 (O'Connor, J., concurring in part and concurring in the judgment) (declining to join Part IV of the plurality opinion because "we should not resolve [the remand] question until it is necessary for us to do so").

The parties differ, of course, as to how these conflicts should be resolved on the merits, and those differences can be fully developed in merits briefs. But petitioner and the Solicitor General fully agree that this case is an appropriate vehicle for resolving the two Westfall Act issues that have divided the lower courts, repeatedly and in multiple ways, for more than a decade and a half.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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February 2006

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No. 05-593

In the Supreme Court of the United States

PAT OSBORN

Petitioner

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LAND BETWEEN THE LAKES ASSOCIATION, INC.

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: NOVEMBER 7, 2005
CERTIORARI GRANTED: MAY 15, 2006

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* "Luber App." is short for the Appendix to the Brief in Opposition for Respondents, Gaye Verdi f/k/a Gaye Luber and Land Between the Lakes Association, Inc., filed on March 31, 2006.

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Nsuit: 2360 P.I.: Other
Osborn v. Haley, et al
Appeal from: Western District of Kentucky at Paducah

* * * * *

Docket as of May 18, 2006 9:25 pm

* * * * *

04-5716 Osborn v. Haley, et al

6/18/04	Civil Case Docketed Notice filed by Appellant Barry Haley. Transcript needed: n (ac) [04-5716]
6/18/04	BRIEFING LETTER SENT setting briefing schedule: appellant brief due 7/28/04; appellee brief due 8/30/04; reply brief due 9/16/04; appendix due 9/23/04; final briefs due 10/14/04. [04-5716] (ac) [04-5716]
6/18/04	Electronic case filing. District court record can downloaded electronically. [04-5716] (ac) [04-5716]
6/28/04	APPEARANCE filed by Attorney Barbara L. Herwig for Appellant Barry Haley [04-5716] (ac) [04-5716]
6/28/04	APPEARANCE filed by Attorney Peter R. Maier for Appellant Barry Haley [04-5716] (ac) [04-5716]
6/28/04	PRE-ARGUMENT STATEMENT filed by Peter R. Maier for Appellant Barry Haley [04-5716] (ac) [04-5716]

04-5716 Osborn v. Haley, et al

6/28/04	TRANSCRIPT ORDER FORM filed by Peter R. Maier for Appellant Barry Haley: No hearings held in District Court. [04-5716] [2983693-1] (blh) [04-5716]
7/15/04	ORDER filed to consolidate for briefing and submission cases 04-5716/5820 [04-5716, 04-5820] (ac) [04-5716 04-5820]
7/15/04	BRIEFING LETTER SENT setting pro se briefing schedule: appellant brief due 8/24/04; appellee brief due 9/27/04; reply brief due 10/14/04; appendix due 10/21/04. (ac) [04-5716 04-5820]
7/19/04	Appellant MOTION filed to extend time to 8/27 to file brief. Motion filed by Barbara L. Herwig and Peter R. Maier for Appellant Barry Haley. Certificate of service 7/16/04 [04-5716] (ac) [04-5716]
7/19/04	RULING declaring as moot the motion to extend briefing [2991939-1] filed by Barbara L. Herwig, Peter R. Maier. Briefing was reset when the related appeal (04-5820) was docketed [04-5716] (ac) [04-5716]
8/11/04	Appellant MOTION filed to extend time to 9/7 to file brief. Motion filed by Barbara L. Herwig and Peter R. Maier for Appellant Barry Haley. Certificate of service date 8/10/04 [04-5716] (ac) [04-5716]

04-5716 Osborn v. Haley, et al

8/18/04	LETTER SENT by ac granting motion to extend briefing [3005539-1] filed by Barbara L. Herwig, Peter R. Maier, Thomas Miller, [3007396-1] resetting briefing schedule: [04-5716, 04-5820] appellant brief due now 9/7/04; appellee brief now due 10/7/04; reply brief now due 10/21/04; appendix now due 10/28/04; final briefs now due 11/18/04. (ac) [04-5716 04-5820]
9/3/04	PROOF BRIEF filed by Peter R. Maier and Barbara L. Herwig for Appellant Barry Haley. Certificate of service date 9/2/04. Number of Pages: 40. [04-5716] (lmn) [04-5716]
9/3/04	Request to require oral argument filed by Peter R. Maier and Barbara L. Herwig for Appellant Barry Haley. [04-5716] (lmn) [04-5716]
9/8/04	BRIEFING LETTER SENT requesting proof brief corrections from Peter R. Maier because corporate disclosure statement is missing; Page #1 should be the jurisdictional statement; more information needed for references. Corrections due: 9/22/04. (lmn) [04-5716]
9/22/04	Corrected Appellant's proof brief filed by Peter R. Maier and Barbara L. Herwig. Copies: 1. Certificate of Service date 9/21/04 [04-5716] (lmn) [04-5716]
10/7/04	BRIEF filed by Pat Osborn for Appellee Pat Osborn. Copies: 7. Certificate of service date 10/4/04. Number of Pages: 2. [04-5716, 04-5820] (lmn) [04-5716 04-5820]

04-5716 Osborn v. Haley, et al

10/29/04	APPENDIX filed by Peter R. Maier and Barbara L. Herwig for Appellant Barry Haley. Copies: 5 (One volume). Certificate of service date 10/27/04. [04-5716, 04-5820] (lmn) [04-5716 04-5820]
10/29/04	FINAL BRIEF filed by Peter R. Maier and Barbara L. Herwig for Appellant Barry Haley. Copies: 7. Certificate of service date 10/27/04. Number of Pages: 41. [04-5716] (lmn) [04-5716]
10/29/04	Request to require oral argument filed by Peter R. Maier and Barbara L. Herwig for Appellant Barry Haley. [04-5716] (lmn) [04-5716]
11/18/04	APPEARANCE filed by Attorney J. Duncan Pitchford for Appellant Land Between the Lak, Appellant Gaye Luber in 04-5820 [04-5820] (yh) [04-5820]
4/8/05	Submission on briefs date set for June 1, 2005, Notice sent to counsel. (pjm) [04-5716 04-5820]
6/1/05	CAUSE SUBMITTED on briefs to panel consisting of Judges Moore, Cook, Gwin sitting on 06.01.05. [04-5716, 04-5820] (kal) [04-5716 04-5820]

04-5716 Osborn v. Haley, et al

9/8/05	OPINION filed: The district court's denial of substitution and remand orders are VACATED and the case is REMANDED for further proceedings, decision for publication pursuant to local rule 206. [04-5716, 04-5820] Karen N. Moore, Circuit Judge, Deborah L. Cook, Authoring Judge, James Gwin, U.S. District Judge for the N.D. of OH. (ac) [04-5716 04-5820]
9/8/05	JUDGMENT: VACATED and remanded. (ac) [04-5716 04-5820]
11/2/05	MANDATE ISSUED with no cost taxed [04-5716, 04-5820] (ac) [04-5716 04-5820]
11/29/05	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Pat Osborn in 04-5716, Appellee Pat Osborn in 04-5820. Filed in the Supreme Court on 11-07-05, Supreme Ct. case number: 05-593. [04-5716, 04-5820] (swh) [04-5716 04-5820]
5/18/06	U.S. Supreme Court letter filed granting petition for writ of certiorari [3277314-1] filed by Pat Osborn, Pat Osborn. In addition to the Questions presented by the petition, the parties are directed to brief and argue the following Question: Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. Sec. 1447(d) [04-5716, 04-5820] Supreme Court No. 05-593 in 04-5716, granting petition for writ of certiorari [3277314-1] filed by Pat Osborn, Pat Osborn [04-5716, 04-5820] in 04-5820. Filed in the Supreme Court on 05-15-06. (swh) [04-5716 04-5820]

General Docket
US Court of Appeals for the Sixth Circuit

Court of Appeals Docket #: 04-5820 Filed: 7/15/04
Nsuit: 4360 P.I.: Other
Osborn v. Haley, et al
Appeal from: Western District of Kentucky at Paducah

* * * * *

Docket as of May 18, 2006 9:25 pm

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04-5820 Osborn v. Haley, et al

7/15/04	Civil Case Docketed. Notice filed by Appellants Gaye Luber, Land Between the Lak. Transcript needed: n (ac) [04-5820]
7/15/04	Electronic case filing. District court record can be downloaded electronically. [04-5820] (ac) [04-5820]
7/15/04	ORDER filed to consolidate for briefing and submission cases 04-5716/5820 [04-5716, 04-5820] (ac) [04-5716 04-5820]
7/15/04	BRIEFING LETTER SENT setting pro se briefing schedule: appellant brief due 8/24/04; appellee brief due 9/27/04; reply brief due 10/14/04; appendix due 10/21/04. (ac) [04-5716 04-5820]
7/15/04	APPEARANCE filed by Attorney C. Thomas Miller for Appellants Land Between the Lak, Gaye Luber. [04-5820] (ac) [04-5820]
7/15/04	PRE-ARGUMENT STATEMENT filed by C. Thomas Miller for Appellants Land Between the Lak, Gaye Luber. 04-5820 [04-5820] (ac) [04-5820]

04-5820 Osborn v. Haley, et al

7/20/04	TRANSCRIPT ORDER FORM filed by C. Thomas Miller for Appellant Land Between the Lak, Appellant Gaye Luber: No hearings held in District Court. [04-5820] [2994328-1] (blh) [04-5820]
8/16/04	Appellant MOTION filed to extend time to 8/27 to file brief. Motion filed by C. Thomas Miller for Appellant Land Between the Lak, Appellant Gaye Luber. Certificate of service date 8/13/04 [04-5820] (ac) [04-5820]
8/18/04	LETTER SENT by ac granting motion to extend briefing [3005539-1] filed by Barbara L. Herwig, Peter R. Maier, Thomas Miller, [3007396-1] resetting briefing schedule: [04-5716, 04-5820] appellant brief due now 9/7/04; appellee brief now due 10/7/04; reply brief now due 10/21/04; appendix now due 10/28/04; final briefs now due 11/18/04. (ac) [04-5716 04-5820]
9/7/04	PROOF BRIEF filed by C. Thomas Miller for Appellants Land Between the Lakes and Gaye Luber. Certificate of service date 9/3/04. Number of Pages: 16. [04-5820] (lmn) [04-5820]
9/7/04	Request to require oral argument filed by C. Thomas Miller for Appellants Land Between the Lakes and Gaye Luber. [04-5820] (lmn) [04-5820]
10/7/04	BRIEF filed by Pat Osborn for Appellee Pat Osborn. Copies: 7. Certificate of service date 10/4/04. Number of Pages: 2. [04-5716, 04-5820] (lmn) [04-5716 04-5820]

04-5820 Osborn v. Haley, et al

10/29/04	APPENDIX filed by Peter R. Maier and Barbara L. Herwig for Appellant Barry Haley. Copies: 5 (One volume). Certificate of service date 10/27/04. [04-5716, 04-5820] (lmn) [04-5716 04-5820]
11/8/04	TENDERED : Appellant's Final Brief from J. Duncan Pitchford for Appellant Land Between the Lakes and Gaye Luber. Waiting for Notice of appearance from Mr. Pitchford. [04-5820] (lmn) [04-5820]
11/8/04	FINAL BRIEF filed by J. Duncan Pitchford and C. Thomas Miller for Appellants Land Between the Lakes and Gaye Luber. Copies: 7. Certificate of service date 11/5/04. Number of Pages: 16. [04-5820] (lmn) [04-5820]
11/8/04	Request to require oral argument filed by J. Duncan Pitchford and C. Thomas Miller for Appellants Land Between the Lakes and Gaye Luber. [04-5820] (lmn) [04-5820]
11/18/04	APPEARANCE filed by Attorney J. Duncan Pitchford for Appellant Land Between the Lak, Appellant Gaye Luber in 04-5820 [04-5820] (yh) [04-5820]
4/8/05	Submission on briefs date set for June 1, 2005, Notice sent to counsel. (pjm) [04-5716 04-5820]
6/1/05	CAUSE SUBMITTED on briefs to panel consisting of Judges Moore, Cook, Gwin sitting on 06.01.05. [04-5716, 04-5820] (kal) [04-5716 04-5820]

04-5820 Osborn v. Haley, et al

9/8/05	OPINION filed: The district court's denial of substitution and remand orders are VACATED and the case is REMANDED for further proceedings, decision for publication pursuant to local rule 206. [04-5716, 04-5820] Karen N. Moore, Circuit Judge, Deborah L. Cook, Authoring Judge, James Gwin, U.S. District Judge for the N.D. of OH. (ac) [04-5716 04-5820]
9/8/05	JUDGMENT: VACATED and remanded. (ac) [04-5716 04-5820]
11/2/05	MANDATE ISSUED with no cost taxed [04-5716, 04-5820] (ac) [04-5716 04-5820]
11/29/05	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee Pat Osborn in 04-5716, Appellee Pat Osborn in 04-5820. Filed in the Supreme Court on 11-07-05, Supreme Ct. case number: 05-593. [04-5716, 04-5820] (swh) [04-5716 04-5820]
5/18/06	U.S. Supreme Court letter filed granting petition for writ of certiorari [3277314-1] filed by Pat Osborn, Pat Osborn. In addition to the Questions presented by the petition, the parties are directed to brief and argue the following Question: Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. Sec. 1447(d) [04-5716, 04-5820] Supreme Court No. 05-593 in 04-5716, granting petition for writ of certiorari [3277314-1] filed by Pat Osborn, Pat Osborn [04-5716, 04-5820] in 04-5820. Filed in the Supreme Court on 05-15-06. (swh) [04-5716 04-5820]

U.S. District Court
Western District of Kentucky (Paducah)
CIVIL DOCKET FOR CASE #: 5:03-cv-00192-TBR

Osborn v. Haley et al
Assigned to: Judge Thomas B. Russell
Cause: 28:1446 Petition for Removal- Personal Injury

Date Filed: 08/20/2003
Jury Demand: None
Nature of Suit: 360 P.I.: Other
Jurisdiction: U.S. Government Defendant

* * * * *

[Docket as of June 12, 2006]

Date Filed	#	Docket Text
08/20/2003	1	NOTICE OF REMOVAL from Trigg County Circuit Court, case number 03-CI-00119, filed by Barry Haley, Land Between the Lakes Association, Inc., and Gaye Luber. (Attachments: # 1 Exhibit 1 (2) Exhibit 2 (3) Cover Sheet) (SGH) (Entered: 08/25/2003)
08/20/2003	2	Case Assignment (Random Selection): Case Assigned to Judge Thomas B. Russell. (SGH) (Entered: 08/25/2003)
08/20/2003	3	MOTION for Extension of Time to File Answer by Barry Haley, Land Between the Lakes Association, Inc., and Gaye Luber. Responses due by 8/28/2003 (Attachments: # 1 Proposed Order) (SGH) (Entered: 08/25/2003)

Date Filed	#	Docket Text
09/05/2003	4	ORDER by Judge Thomas B. Russell on 8/31/03; granting 3 Motion for Extension of Time to Answer up to & including 10/20/03 to file its initial pleading (cc: all counsel) (KJI) (Entered: 09/05/2003)
10/16/2003	5	MOTION for Extension of Time to File Answer an additional 30 days by Barry Haley. (Attachments: # 1 Proposed Order) (KJI) (Entered: 10/20/2003)
10/24/2003	6	ORDER by Thomas B. Russell on 10/22/03: granting 5 Motion for Extension of Time to Answer an additional 30 days. (cc: all counsel) (KJI) (Entered: 10/24/2003)
11/19/2003	7	ANSWER to Complaint by Barry Haley, Land Between the Lakes Association, Inc., Gaye Luber.(KJI) (Entered: 11/20/2003)
11/25/2003	8	ORDER by Judge Thomas B. Russell on 11/25/03: Scheduling Conference set for 1/12/2004 at 2:45 PM before Judge Thomas B. Russell. (cc: all counsel) (KJI) (Entered: 11/25/2003)
12/03/2003	9	NOTICE FOR CORRECTED SERVICE by Land Between the Lakes Association, Inc., Gaye Luber. (KJI) (Entered: 12/03/2003)
12/18/2003	10	AMENDMENT TO PROPOSED DISCOVERY PLAN by Pat Osborn. (KJI) (Entered: 12/18/2003)

Date Filed	#	Docket Text
01/09/2004	11	MOTION to Substitute Party United States for Barry Haley by Land Between the Lakes Association, Inc. Responses due by 1/27/2004 (Attachments: # 1 Certification # 2 Proposed Order) (KJI) (Entered: 01/12/2004)
01/09/2004	12	MOTION to Stay Discovery by Land Between the Lakes Association, Inc. Responses due by 1/27/2004 (Attachments: # 1 Proposed Order) (KJI) (Entered: 01/12/2004)
01/09/2004	13	MOTION to Dismiss by Land Between the Lakes Association, Inc. [N.B.: should be: "by United States"] Responses due by 1/27/2004 (Attachments: # 1 Proposed Order) (KJI) (Entered: 01/13/2004)
01/16/2004	14	ORDER by Judge Thomas B. Russell on 1/12/04: Telephone Conference set for 3/10/2004 at 8:45 AM before Judge Thomas B. Russell. (cc: all counsel, pla) (KJI) (Entered: 01/16/2004)
01/27/2004	15	RESPONSE to Motion re 13 MOTION to Dismiss by Pat Osborn. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 Proposed Order) (KJI) (Entered: 01/27/2004)
01/29/2004	16	MOTION to Dismiss by Land Between the Lakes Association, Inc.; Gaye Luber. Responses due by 2/17/2004 (Attachments: # 1 Memorandum in Support # 2 Proposed Order) (KJI) (Entered: 01/29/2004)

Date Filed	#	Docket Text
02/09/2004	17	REPLY to Response to Motion re 13 MOTION to Dismiss by Land Between the Lakes Association, Inc. [N.B.: should be: "by United States"] (KJI) (Entered: 02/10/2004)
02/25/2004	18	REPLY to Response to Motion re 16 MOTION to Dismiss by Land Between the Lakes Association, Inc., Gaye Luber. (KJI) (Entered: 02/25/2004)
03/12/2004	19	MEMORANDUM AND OPINION by Judge Thomas B. Russell on 3/10/04: separate order entered this date consistent w/ memo opinion (cc: all counsel) (KJI) (Entered: 03/12/2004)
03/12/2004	20	ORDER by Judge Thomas B. Russell on 3/10/04: Remanding case to Trigg Circuit Court (cc: all counsel, Trigg Circuit Court) (KJI) (Entered: 03/12/2004)
03/24/2004	21	MOTION to Stay Remand Order by Barry Haley; Land Between the Lakes Association, Inc. Responses due by 4/12/2004 (Attachments: # 1 Proposed Order) (KJI) (Entered: 03/25/2004)
03/24/2004	22	MOTION for Reconsideration re 19 Memorandum & Opinion, 20 Order Dismissing Case by Barry Haley. Responses due by 4/12/2004 (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Proposed Order # 4 Proposed Order) (KJI) Modified on 4/27/2004 (deleted incorrect filer) (KJI). (Entered: 03/26/2004)

Date Filed	#	Docket Text
04/06/2004	23	RESPONSE to Motion re 22 MOTION for Reconsideration re 19 Memorandum & Opinion, 20 Order Dismissing Case by Pat Osborn. (Attachments: # 1 Proposed Order) (KJI) (Entered: 04/06/2004)
04/19/2004	24	MOTION for Extension of Time to File Reply to Response to Motion to Reconsider by Barry Haley. Responses due by 4/27/2004 (Attachments: # 1 Proposed Order) (KJI) (Entered: 04/20/2004)
04/26/2004	25	REPLY to Response to Motion re 22 MOTION for Reconsideration re 19 Memorandum & Opinion, 20 Order Dismissing Case by Barry Haley. (Attachments: # 1 Exhibit) (KJI) (Entered: 04/27/2004)
04/29/2004	26	ORDER by Judge Thomas B. Russell on 4/24/04; granting 24 Motion for Extension of Time to File Reply up to 4/26/04 (cc: all counsel) (KJI) (Entered: 04/29/2004)
05/13/2004	27	ORDER by Judge Thomas B. Russell on 5/13/04; denying 21 Motion to Stay, denying 22 Motion for Reconsideration (cc: all counsel) (KJI) (Entered: 05/13/2004)
06/14/2004	28	NOTICE OF APPEAL as to 27 Order on Motion to Stay, Order on Motion for Reconsideration by Barry Haley. (KJI) (Entered: 06/15/2004)

Date Filed	#	Docket Text
06/18/2004	29	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 28 Notice of Appeal (KJI) (Entered: 06/18/2004)
06/18/2004		USCA Case Number 04-5716 for 28 Notice of Appeal filed by Barry Haley. (KJI) (Entered: 06/18/2004)
06/22/2004	30	NOTICE OF APPEAL as to 19 Memorandum & Opinion, 20 Order Dismissing Case, 27 Order on Motion to Stay, Order on Motion for Reconsideration, by Land Between the Lakes Association, Inc., Gaye Luber. Filing fee $ 255, receipt number 13696. (Attachments: # 1 Receipt) (KJI) (Entered: 06/23/2004)
06/25/2004	31	DESIGNATION of Record on Appeal by Barry Haley re 28 Notice of Appeal (KJI) (Entered: 06/25/2004)
06/28/2004	32	TRANSCRIPT REQUEST by Barry Haley No Hearings re 28 Notice of Appeal (KJI) (Entered: 06/29/2004)
06/29/2004	33	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 30 Notice of Appeal (KJI) (Entered: 06/29/2004)
07/02/2004	34	TRANSCRIPT REQUEST by Land Between the Lakes Association, Inc., Gaye Luber re 30 Notice of Appeal, no hearings (KJI) (Entered: 07/02/2004)

Date Filed	#	Docket Text
07/02/2004	35	DESIGNATION of Record on Appeal by Lar.d Between the Lakes Association, Inc., Gaye Luber re 30 Notice of Appeal (KJI) (Entered: 07/02/2004)
10/07/2004	36	NOTICE of Appearance by Michael D. Ekman on behalf of on behalf of Barry Haley Substitution for: Brady Miller (Ekman, Michael) (Entered: 10/07/2004)
11/07/2005	37	MANDATE of USCA as to 30 Notice of Appeal, filed by Gaye Luber,, Land Between the Lakes Association, Inc., 28 Notice of Appeal filed by Barry Haley; remanding case for further proceedings (KJS) (Entered: 11/09/2005)
12/06/2005		Remark : Received letter from Supreme Court of the United States addressed to US Court of Appeals advising that a petition for writ of certiorari was filed on 11/7/05 and placed on the docket 11/10/05 as 05-593. (KJS) (Entered: 12/06/2005)
05/22/2006	38	Letter from Office of the Clerk, Supreme Court of the United States that petition for writ of certiorari granted. (CSD) (Entered: 05/22/2006)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
Case No. 5:03CV-192-R

[Filed Jan. 27, 2004]

PAT OSBORN — PLAINTIFF

vs. **PLAINTIFF'S RESPONSE TO UNITED STATES' MOTION TO DISMISS**

BARRY HALEY,
ET AL — DEFENDANTS

Plaintiff Pat Osborn requests the court to deny the United States' motion to dismiss plaintiff's complaint, and in support thereof, submits the following memorandum of law.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S REQUEST TO DENY UNITED STATE'S MOTION TO DISMISS

Summary of Argument

A. Plaintiff's complaint alleges facts that show defendant Barry Haley acted outside the scope of his employment when performing the acts which form the basis of plaintiff's complaint.

B. Plaintiff has information that leads her to believe that a written "Memorandum of Understanding" executed by USDA Forest Service and LBLA, in effect at the time of her discharge, specifically prohibited Forest Service employees from participating in any LBLA decision regarding the hiring or firing of LBLA employees.

C. Defendant Barry Haley's conduct in causing plaintiff to be fired for filing a veterans preference inquiry fails the scope of employment test under Kentucky Law as set out in ***Coleman v. United States***.

Argument

I. Factual Background.

Defendant was employed by USDA Forest Service, a United States government agency. Plaintiff was employed by LBLA, a private association. Plaintiff applied for a job with USDA Forest Service. When plaintiff did not get the job with USDA Forest Service, she exercised her right to file a veterans' preference inquiry with the U.S. Department of Labor. Defendant Barry Haley became aware of the fact that plaintiff had filed a veterans' preference inquiry. Defendant Barry Haley acted to cause plaintiff's employer, LBLA, to fire plaintiff. Complaint pages 1-5, 7, 8, 10.

II. Defendant Barry Haley acted outside the scope of his employment.

A. Plaintiff's complaint alleges that defendant Barry Haley was ". . . acting outside the scope of his employment." Complaint page 7. After finding out from a Department of Labor investigator that plaintiff had filed a veterans' preference inquiry (Complaint page 4), defendant Barry Haley ". . . induced, persuaded, or coerced defendant Gaye Luber to discharge plaintiff from her job with defendant LBLA in retaliation for plaintiff filing a veterans' preference inquiry[."] (Complaint page 7).

B. Attached to this response as "Exhibit A" is a copy of a draft of a Memorandum of Understanding between U.S. Forest Service and LBLA. It states in item 3 at the bottom of page 4 "**A Forest Service employee shall not participate in any LBLA decision concerning the relationship of the LBLA to the Forest Service, including, but not limited to executing or negotiating contracts, signing checks, OR HIRING OR FIRING LBLA EMPLOYEES**. (Emphasis added). Filed with this response as "Exhibit B" is plaintiff's affidavit stating that she has information credible information that a similar Memorandum of Understanding was executed and in effect for the period in which she was fired from her job.

C. In *Coleman v. United States*, 91 F.3d 820 (6th Cir. 1996), the court states four factors to consider under Kentucky law to determine if an employee is acting in the scope of his employment. 1) Whether the conduct was similar to that which the employee was hired to perform; (2) whether the action occurred substantially within the authorized spacial and temporal limits of the employment; (3) whether the action was in furtherance of the employer's business; and (4) whether the conduct, though unauthorized, was expectable in view of the employee's duties. Citing *Flechsig v. United States*, 991 F.2d 300, 303 (6th Cir. 1992); *Frederick v. Collins*, 378 S.W.2d 617, 619 (Ky. Ct. App. 1964); *Wood v. Southeastern Greyhound Lines*, 194 S.W.2d 81, 83 (Ky. Ct. App. 1946).

Defendant Barry Haley's conduct fails test 1 because he was not hired by U.S. Forest Service to interfere in the employment relationship of a private individual employed by a private association. This was prohibited conduct.

Defendant Barry Haley's conduct may or may not have occurred at his employer's place of business as discussed in test 2, but this is irrelevant if the conduct itself was prohibited.

Defendant Barry Haley's conduct was not in furtherance of the U.S. Forest Service business as required in test 3, and in fact acted to taint the image of his employer by having a veteran fired from her job for exercising a legal right.

Finally, defendant Barry Haley's conduct was not authorized by his employer as required in test 3. In fact, in the draft Memorandum of Understanding discussed above, defendant's conduct was **SPECIFICALLY PROHIBITED** by defendant's employer (emphasis added).

Finally, plaintiff has attached as "Exhibit C" a letter from Mr. Robert Kuenzli, the Department of Labor investigator who spoke with defendant Barry Haley concerning

plaintiff's veterans preference inquiry. The letter is to Mr. Kuenzli's supervisor and states that plaintiff was fired because of the inquiry. While the letter may not be admissible at trial, Mr. Kuenzli is expected to testify on plaintiff's behalf.

Conclusion

The United States' motion to dismiss should be denied for the reasons outlined. In addition, the Attorney General's certification that defendant Barry Haley was acting in the scope of his employment should be reversed. Barry Haley should be resubstituted as defendant in this action if he has been removed. In addition, any stay that has entered relating to discovery should be lifted. A proposed order is attached.

It is plaintiff's position that her complaint alleges facts that, when viewed in the manner most favorable to plaintiff, show that defendant Barry Haley's conduct was outside the scope of his employment and should survive the United States' motion to dismiss. If the court were to view the complaint as fatally defective, plaintiff will file a motion pursuant to Rule 15(a), FRCP to amend her complaint to include the additional facts alleged in this response. In this case, plaintiff would ask the court to postpone ruling on the motion to dismiss until she can prepare a motion to amend her complaint. Again, it is plaintiff's position that this is not necessary and the motion to dismiss should be dismissed.

DATED: 1-26-04 BY: /s/ Pat Osborn

Pat Osborn
[address and telephone number]

PLAINTIFF PRO SE

[Certificate of service omitted in printing]

[Exhibit A]

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
USDA FOREST SERVICE & LBLA
Federal Fiscal Year 2001

[The remainder of the text on this page is handwritten.]

9/22/00 FY01
Final Version
Expired—> 9/30/01

/s/ William P. Lisowsky
William P. Lisowsky
Area Supervisor

Please
See P's 4 & 5
herein

Fs agreement No. 11086001-020
Cooperator Tax # [blacked out]
9/22/00

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
USDA FOREST SERVICES, LBL NRA
AND THE
LAND BETWEEN THE LAKES ASSOCIATION

The USDA Forest Service, LBL NRA (Forest Service), and the Land Between The Lakes Association (LBLA), hereby enter into the following Memorandum of Understanding (MOU).

WITNESSETH:

Whereas, the Forest Service is responsible for developing the National Forest resources for sustained yields of products and services in the best combination for the use, enjoyment, and education of the American people, as provided in the Organic Administration Act of 1897, the Multiple-Use Sustained-Yield Act of 1960, and other laws. It is the policy of Congress that the National Forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.

Whereas, the Forest Service is conducting a program to provide facilities within the National Forest for outdoor recreational and educational activities for the public; and

Whereas, the Forest Service deems it desirable to provide educational and interpretive information about the forest resources, natural phenomena, local history, and similar matters; and

Whereas, the LBLA has as a purpose the promotion of the educational, historical, scientific, and other values of LBL and of assisting educational and interpretive activities of the Forest Service;

Now therefore, in consideration of the above premises, the parties agree as follows:

A. LAND BETWEEN THE LAKES ASSOCIATION SHALL:

1. Administer and staff each of LBL's three visitor receptionist facilities—the North and South Welcome Stations and the Golden Pond Visitor Center.

a. Greet and orient visitors.

b. Provide LBL and regional information.

c. Check game harvested at LBL.

d. Sell LBL user permits and maps.

e. Keep all appropriate daily records as requested by the Forest Service.

f. Deposit in Forest Service designated night depositories daily fee collections.

g. Arrange for basic cleaning services for the North and South Welcome Stations.

2. Provide visitor receptionists for LBL's Nature Station and The Homeplace 1850.

a. Greet and orient visitors.

b. Collect fees for the respective facilities.

c. Keep all appropriate daily records as requested by the Forest Service.

d. Deposit in Forest Service designated night depositories daily fee collections.

3. Cooperatively provide major gift funds development services for LBL.

a. Prepare an annual Funds Development Plan for LBL.

b. Identify major philanthropic markets.

c. Research potential funding opportunities and partnership opportunities for LBL.

d. Prepare grant requests and other solicitation materials.

e Maintain ongoing funds development records.

4. Provide direct delivery interpretive staff for LBL's Golden Pond Planetarium, Nature Station, The Homeplace 1850, Elk & Bison Prairie, and other sites within LBL to meet Forest Service needs.

a. Hire, pay, and supervise direct delivery interpretive staff.

b. Provide interpretive programs and events with direction from, and under the guidelines of, the US Forest Service.

c. Assist in maintenance and care of artifacts and interpretive materials.

d. Provide for maintenance and care of livestock and wildlife under the US Forest Service and US Fish and Wildlife guidelines and direction.

e. Participate in planning and development of physical site, program, and exhibit improvements.

5. Provide the operational needs for LBL's Elk & Bison Prairie.

a. Collect monies from the machine on an as necessary basis.

b. Deliver monies collected to the Forest Service depository.

c. Replace token supply.

d. Replenish brochures in rack as necessary.

e. Clean dollar bill validating equipment weekly.

f. Keep financial and visitation records as required by the Forest Service.

g. Keep the Elk & Bison Prairie free of litter.

h. Maintain the cleanliness of displays.

i. Distribute tokens to LBL staff and facilities as necessary.

6. Administer the operations of the Golden Pond Planetarium and Observatory.

a. Purchase and develop shows for the planetarium.

b. Arrange for the annual maintenance for the Spitz planetarium equipment from Spitz, Inc.

c. Properly maintain all current planetarium and observatory equipment.

d. Promote visitation to the planetarium.

7. Cooperatively provide administration for the LBL Volunteer Program.

a. Identify and develop volunteer opportunities.

b. Recruit volunteers.

c. Train volunteers to the extent LBLA is qualified to do so.

d. Acknowledge volunteer efforts.

e. Maintain volunteer records.

8. Provide administration of funds restricted for specific uses at LBL.

a. Except as otherwise set forth by granting guidelines, the LBLA will retain interest earned on restricted funds for operational needs.

9. Administer an annual membership program.

10. Administer and staff retail operations at the Golden Pond Visitor Center, the Nature Station, The Homeplace 1850, and North and South Welcome Stations for the sale of educational and interpretive items for the benefit of the visiting public.

a. Sell interpretive and educational items, such as publications, maps, visual aids, handicrafts, and other objects directly related to the interpretive and educational themes of the facilities at LBL.

b. Sell visitor convenience items as relate to the enjoyment of LBL, such as tick spray, sunscreen, etc.

c. Not sell artifacts protected by the Antiquities Act of 1906 (P.L. 59-209), the Archeological Resources Protection Act of 1979 (P.L. 96-95), and the Alaska Historic Preservation Act of 1971, as amended.

d. By this agreement, not be granted the right to sell items that would infringe upon applicable contract rights of concessionaires.

e. Maintain professional standards and quality in all items produced or sold.

f. Sell items at fair market value.

g. Display the items in good taste and in keeping with the general design and decor of the Forest Service facilities at that location.

11. Provide soft drink and snack machines throughout LBL for the convenience of LBL visitors.

12. Accounting Records

a. Be solely responsible for the financial arrangements for the work under this agreement, including costs of obtaining stocks of LBLA materials and for the receipt and disposition of monies from sales, and hold harmless the Forest Service or its officers responsible for loss of LBLA materials or money from sales, or for any

other financial loss incurred as the result of this agreement.

b. Keep appropriate financial books, records, and accounts pertaining to this Agreement to standards acceptable to the Forest Service or generally acceptable accounting practices.

c. Unless otherwise protected by law, allow authorized officials or Agents of the Forest Service, or any other Federal agency authorized to do so, to examine such financial books, records, and accounts of the LBLA, as deemed necessary by the Forest Service, or other authorized Federal agency, and that these records and accounts will be retained by the LBLA and kept available for at least 3 years, unless disposition is otherwise authorized in writing by the Forest Service. Such books, records, and accounts may be examined at any reasonable and convenient time during such periods.

d. Provide two copies of form FS 2300-5, Annual Report Interpretive Associations by April 15 each year to the Regional Forester with a copy to the Forest Supervisor.

13. Other

a. Designate a LBLA member or employee who is authorized to act as liaison with the Forest Service.

b. Maintain a distinct separation, evident to the public, between the activities and management of the LBLA and those of the Forest Service.

c. Reimburse the Forest Service for member benefit coupons on discounted LBL fees.

d. Purchase at a minimum the Forest Service mandated level of liability insurance for all LBLA activities.

B. FOREST SERVICE SHALL:

1. Technical Assistance

a. Provide broad program direction and guidance for LBL's Nature Station, The Homeplace 1850, and Elk & Bison Prairie.

b. Provide technical assistance as required, i.e. provide prompt updates to facility staff regarding operational changes, interpretive planning, etc.

c. Include the Golden Pond Planetarium in promotional materials produced for LBL.

2. Sale Items

a. Cooperate with the LBLA in the planning and design of merchandise appropriate for sale by the LBLA at the Forest Service facilities.

b. Maintain the right to request the discontinuance of any sale item deemed inappropriate.

3. Facilities and Equipment

a. Provide the LBLA with such space and other facilities as may hereafter be deemed necessary or desirable by the Forest Service, provided that the Forest Service reserves the right to relocate or withdraw any such facilities, subsequent to reasonable notice, in order to meet the needs of the Forest Service.

b. Provide the LBLA with appropriate storage space for surplus sales inventory.

c. Provide the LBLA with a staging area for unpacking and labeling sale items.

d. Provide the LBLA with adequate administrative office space and interpreter office space.

e. Allow the LBLA to utilize Forest Service meeting rooms as needed for regular business meetings and meetings of the Board of Trustees.

f. Allow the LBLA free use of Forest Service copying and facsimile machines.

g. Provide the LBLA an office/workroom in the Golden Pond Visitor Center for planetarium staff.

h. Allow the LBLA to utilize Forest Service depositories for temporary secure storage of daily sales receipts.

i. Make such surveys and inspections, as the Forest Service deems necessary.

j. Reserve the right to design and construct any new facilities, and shall allow the LBLA review and comment on any plans thereof.

k. Provide the LBLA with incidental utility services at each assigned facility, including water, electricity, heat, air conditioning, telephone, to the extent these utilities are required for the operation of the building for Governmental purposes.

l. Provide all general maintenance and repair services for the Government-owned buildings. With the exception of basic cleaning of the North and South Welcome Stations, which will be provided by the LBLA.

m. Provide computers, computer software, and computer support services for LBLA interpretive staff.

n. Provide non-specialty computer software, and all computer support services for all LBLA functions.

4. Personnel

a. Designate an employee as Interpretive Association Coordinator who will serve as a liaison to the LBLA. The role of the Interpretive Association Coordinator (liaison) is to represent the interests of the Forest Service and to provide assistance to the LBLA; hence, he or she shall not be a board member of the LBLA. His or her scope of LBLA responsibility shall be limited to ensuring that the spirit and intent of this Agreement are fulfilled and to provide expertise to LBLA.

b. Provide all employees who will establish program direction and guidelines for LBL's Nature Station, The Homeplace 1850 and coordinate daily operations.

5. Other

a. Shall old harmless the LBLA for loss of materials or money from sales, or for any other financial loss incurred as the result of this agreement.

b. Provide tokens to LBL's Elk & Bison Prairie for LBLA membership benefits.

C. IT IS MUTUALLY AGREED AND UNDERSTOOD BY AND BETWEEN THE PARTIES THAT:

1. The LBLA's Articles of Incorporation and the LBLA's By-Laws shall comply with requirements of the State in which the LBLA is incorporated. Non-profit status 501(c)(3) must be maintained in accordance with Federal and state laws, and the LBLA will make available for inspection, at the request of the Forest Service, documents demonstrating non-profit status. This Agreement will automatically terminate if non-profit status is lost.

2. Forest Service employees may be members of the LBLA, but shall not be officers, LBLA employees, or members of the Board of Trustees.

3. Forest Service employees shall not represent the LBLA in any matter between the LBLA and the Forest Service. A Forest Service employee shall not participate in any LBLA decision concerning the relationship of the LBLA to the Forest Service, including, but not limited to, executing or negotiating contracts, signing checks, or hiring or firing LBLA employees.

4. Association personnel are not Government employees and are not authorized to undertake any Governmental function or activity on behalf of the Forest Service beyond routine visitor information services and parti-

cipation in museums, living history, or like programs. Association employees shall not engage in activities that would reasonably lead the visiting public to conclude that they are Government employees. No LBLA employee shall wear a Forest Service or other Government employee uniform unless they are under a volunteer agreement. All LBLA employees shall wear some easily observable and readily identifiable indication of LBLA affiliation while working with the public on LBLA business.

5. The Forest Service will authorize the LBLA's entry, occupancy and use of LBL land under the applicable statutory authority when needed.

6. Any activities considered to be accomplished by the parties directly benefiting the Forest Service and requiring a payment by the Forest Service to the LBLA, shall be accomplished using procurement procedures. This agreement by itself, does not limit competition.

7. The rights and benefits conferred by this agreement shall be subject to the laws of the United States governing the Forest Service and to the rules and regulations promulgated hereunder, whether now in force or hereafter enacted or provided; and the mention of specific restrictions, conditions, and stipulations herein shall not be construed as in any way impairing the general powers of supervision, regulation, and control by the Forest Service.

8. Pursuant to Section 22, Title 41, United States Code, no member of, or delegate to, Congress or Resident Commissioner shall be admitted to any share or part of this Agreement or to any benefit that may arise there from, but this restriction shall not be construed to extend to this Agreement if made with a corporation or company for its general benefit.

9. The LBLA agrees that all of its activities shall be conducted in accordance with all applicable laws and regulations, both State and Federal. Specifically the LBLA shall comply with the requirements of (a) Executive Order No. 11246 of September 24, 1967; (b) Title V, Section 503 of the Rehabilitation Act of September 26, 1973 (P.L. 93-112), which requires contractors and cooperators to take affirmative action to employ and to advance in employment qualified handicapped individuals; (c) Title VI of the Civil Rights Act of 1964 and all requirements imposed by or pursuant to the Regulations of the U.S. Department of Agriculture (7 CFR, Part 15) issued pursuant to that Act.

10. In all cases where rights or privileges are granted herein in general or definite terms, the extent of the use of such rights or privileges by the LBLA shall be determined by further written agreement.

11. This agreement is neither a fiscal nor a funds obligation document. Any endeavor involving reimbursement or contribution of funds between the parties to this agreement will be handled in accordance with applicable laws, regulations, and procedures including those for Government procurement and printing. Such endeavors will be outlined in separate agreements that shall be made in writing by representatives of the parties and shall be independently authorized by appropriate statutory authority. This agreement does not provide such authority. Specifically, this agreement does not establish authority for noncompetitive award to the cooperator of any contract or other agreement. Any contract or other agreement for training or other services must fully comply with all applicable requirements for competition

12. Either party, in writing, may terminate the agreement in whole, or in part, at any time before the date of expiration.

13. Modifications within the scope of this agreement shall be made by the issuance of a bilaterally executed modification prior to any changes being performed.

14. This agreement in no way restricts the Forest Service or the LBLA from participating in similar activities with other public or private agencies, organizations, and individuals.

15. This agreement is executed as of the last date shown below and expires on September 30, 2001, at which time it will be subject to review, renewal, or expiration.

16. The principal contacts for this agreement are:

William Lisowsky	Gaye Luber
USDA Forest Service	Executive Director
Land Between The Lakes	Land Between The
NRA Area Supervisor	Lakes Association
100 Van Morgan Drive	100 Van Morgan Drive
Golden Pond, Kentucky 42211	Golden Pond, Kentucky 42211
(270) 924-2000	(270) 924-2088

IN WITNESS WHEREOF the parties hereto have executed this agreement as of the last date of signature:

USDA Forest Service, LBL NRA

By: _____
William Lisowsky, Area Supervisor

_____
Date

Land Between The Lakes Association

By: _____
Gaye Luber, Executive Director

_____
Date

[Exhibit B]

AFFIDAVIT

THE AFFIANT, after first being duly sworn, states as follows:

1. My name is Pat Osborn and I reside at [address].

2. I am the plaintiff in the case *Osborn v. Haley et al*, Civil Action No. 5:03-CV-00192-R, United States District Court, Western District of Kentucky at Paducah.

3. It is my belief, based upon information from more than one credible source, that at the time I was fired by my employer LBLA, there was a "Memorandum of Understanding" in effect between LBLA and the U.S. Forest Service, Land Between the Lakes National Recreation Area. The memorandum was similar to the one attached as "Exhibit A" to plaintiff's Response to United States' Motion to Dismiss. It also contained a similar provision specifically prohibiting U.S. Forest Service employees from participating in any LBLA decision regarding the hiring or firing of LBLA employees.

/s/ Pat Osborn 1-26-04
Pat Osborn Date

[Jurat omitted in printing]

[Filed Feb. 9, 2004]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

PAT OSBORN — PLAINTIFF

v. — CIVIL ACTION NO. 5:03-CV-00192-R

BARRY HALEY, Individually
GAYE LUBER
LAND BETWEEN THE
LAKES ASSOCIATION, INC. — DEFENDANTS

UNITED STATES' REPLY TO PLAINTIFF'S RESPONSE TO UNITED STATES' MOTION TO DISMISS

The United States moved the court to dismiss the above-styled case as against the federal defendant, and plaintiff filed a response. The United States submits as follows in reply thereto.

MEMORANDUM IN SUPPORT OF UNITED STATES' REPLY TO PLAINTIFF'S RESPONSE TO UNITED STATES' MOTION TO DISMISS

INTRODUCTION

While working at Land Between the Lakes Association ("LBL"), plaintiff, a veteran, applied for a Forest Service job. When she was not hired for that job, she filed an inquiry with the Department of Labor to find out whether she was accorded veteran status in the hiring process. She claims that LBL supervisor Gaye Luber and Forest Service manager Barry Haley, unhappy with her Department of Labor inquiry, conspired to fire her from her job at LBL.

The United States filed a motion to substitute the United States for individual federal defendant Barry Haley because he was acting within the scope of employment at all times relevant to the common law tort allegations in the complaint. The United States also moved to dismiss the complaint for lack of jurisdiction because plaintiff failed to file an administrative claim with the Forest Service before bringing suit, as required by the Federal Tort Claims Act.

Plaintiff's sole response is to contest scope of employment. She argues that Haley's alleged act of causing her firing violated an agreement between the Forest Service and LBLA, thus exceeding the scope of his employment under Kentucky law. Response at 2, 3. As explained below, however, plaintiff fails utterly to meet her burden of coming forward with specific facts to refute the scope certification. Accordingly, the United States should be substituted for Barry Haley in this action, which should be dismissed for failure to exhaust administrative remedies under the Federal Tort Claims Act.

ARGUMENT

A certification by the Attorney General is conclusive evidence that the employee was acting within the scope of his employment. Once the certification is filed, and plaintiff seeks to challenge it, the burden of proof on the question of scope shifts to the plaintiff. *See, e.g., Borneman v. United States*, 213 F.3d 819, 827 (4th Cir. 2000); *Day v. Massachusetts Air National Guard*, 167 F.3d 678, 685 (1st Cir. 1999); Taboas v. Mlynczak, 149 F.3d 576, 581 (7th Cir. 1998); *Palmer v. Newton*, 93 F.3d 196, 198 (5th Cir. 1996); *Flohr v. Mackojak*, 84 F.3d 386, 390 (11th Cir. 1996); *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995); *Richman v. Straley*, 48 F.3d 1139, 1145 (10th Cir. 1995); *Kimbro v. Velten*, 30 F.3d 1501, 1505 (D.C. Cir. 1994); *Melo v. Hafer*, 13 F.3d 736, 747 (3d Cir. 1994).

Plaintiff fails to meet her burden. Plaintiff argues her complaint "alleges facts that show defendant Barry Haley

acted outside the scope of his employment when performing the acts which form the basis of plaintiff's complaint." Response at 1. The complaint does nothing of the sort. Rather, it states that Haley was employed by the Forest Service at all times relevant to complaint. Complaint at ¶ 6. The complaint further states:

> 15. On June 17, 2002, plaintiff was contacted by telephone by Mr. Robert Kuenzli, an investigator with the United States Department of Labor, and interviewed regarding the written veterans' preference inquiry filed by the plaintiff with the United States Department of Labor.
>
> 16. During plaintiff's conversation with Mr. Kuenzli on June 17, 2002, Mr. Kuenzli asked plaintiff whom he could contact at the U.S. Forest Service to determine if plaintiff had received her veterans' preference points when being considered for the position. Plaintiff told Mr. Kuenzli that defendant Barry Haley should be contacted, and provided his phone number. Plaintiff also stated to Mr. Kuenzli that if defendant Barry Haley found out that plaintiff had filed a veterans' preference inquiry with the U.S. Department of Labor, there was a good chance defendant Barry Haley would cause plaintiff to lose her job.
>
> 17. On June 17, 2002, after his conversation with plaintiff, Mr. Kuenzli contacted defendant Barry Haley by telephone. While investigating the award of veterans' preference points to applicants in the hiring process for the Contract Specialist Trainee, at defendant Barry Haley's insistence, Mr. Kuenzli acknowledged that plaintiff had filed a written veterans' preference inquiry with the Department of Labor.

Complaint at ¶¶ 15-17. The complaint next states that, after Kuenzli's conversation with Haley, Gaye Luber summoned plaintiff to her office and asked her to apologize to Haley, that plaintiff refused, and that two days later plaintiff was fired. Complaint at ¶¶ 18-20.

The foregoing constitute all the "facts" in the complaint concerning Barry Haley's conduct. These factual assertions are insufficient to rebut the Attorney General's certification that Haley acted within the scope of his employment. To be sure, the complaint additionally contains conclusory allegations that Haley "wrongfully and maliciously induced, persuaded, or coerced defendant Gaye Luber to discharge plaintiff" from LBL. Complaint at 7, 8, 10. These allegations, however, have no putative factual basis in plaintiff's own complaint. Plaintiff's bare assumption of a nexus between her firing and her veterans' preference inquiry is inadequate to provide a factual basis for challenging the scope certification. Plaintiff presents no facts, either in her complaint or in her response to the motion to substitute, that would support her allegation that Haley acted outside the scope of his employment. Accordingly, the Attorney General's certification must stand. *See, e.g., Rogers v. Management Technology, Inc.*, 123 F.3d 34, 37 (1st Cir. 1997).

Plaintiff attached to her response two documents, neither of which provides support for her claims. The first is a memorandum of understanding between LBL and the Forest Service which states in pertinent part that the latter will not interfere in LBL's employment matters. As discussed above, plaintiff alleged no facts to support an inference that Haley even attempted to affect her employment.

Plaintiff also attached to her response a letter from Department of Labor investigator Robert Kuenzli stating that his phone call to Haley caused Osborn to "loose [sic] her job." However, the letter is of no probative value as it is clearly based entirely on plaintiff's complaints to the investigator.

CONCLUSION

For the reasons stated above, in its motion to substitute, and in its motion to dismiss, the United States should be substituted as sole defendant herein in place of federal defendant Barry Haley, and the action should be dismissed for failure to exhaust administrative remedies under the Federal Tort Claims Act.

Respectfully submitted,

DAVID L. HUBER
United States Attorney

/s/ W. Brady Miller

W. Brady Miller
Assistant U.S. Attorney
510 W. Broadway, 10th Floor
Louisville, KY 40202
(502) 582-5166

[Certificate of service omitted in printing]

[Filed Mar. 24, 2004]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

PAT OSBORN — PLAINTIFF

v. — CIVIL ACTION NO. 5:03-CV-00192-R

BARRY HALEY, Individually
GAYE LUBER
LAND BETWEEN THE
LAKES ASSOCIATION, INC. — DEFENDANTS

UNITED STATES' MOTION TO RECONSIDER ORDER DENYING MOTION TO DISMISS AND SUBSTITUTION OF UNITED STATES FOR FEDERAL DEFENDANT BARRY HALEY

The United States, pursuant to Fed. R. Civ. P. 59(e), moves the court to reconsider its Order entered March 12, 2004, denying the United States' motion to dismiss and overruling the United States' substitution of itself as defendant herein in place of federal defendant Barry Haley. In support, the United States submits the following memorandum of law.

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER ORDER DENYING MOTION TO DISMISS AND SUBSTITUTION OF UNITED STATES FOR FEDERAL DEFENDANT BARRY HALEY

The United States, pursuant to Fed. R. Civ. P. 59(e), moves the court to reconsider its Order entered March 12, 2004, denying the United States' motion to dismiss and overruling the United States' substitution of itself as de-

fendant herein in place of federal defendant Barry Haley. In support, the United States submits as follows:

INTRODUCTION

By order entered March 12, 2004, this court denied the United States' substitution of itself as defendant in place of Barry Haley, and overruled the United States' motion to dismiss for failure to file an administrative claim. The court also remanded the action to the Trigg County Circuit Court. (R. 20: Order). In its memorandum opinion accompanying the order, the court found that plaintiff adequately alleged conduct that, if proven, would fall outside the scope of Barry Haley's employment. Since the court believed the United States did not contest the allegations, it accepted them as conclusive on the issue of scope, and found that the United States could not be substituted as defendant. (R. 19: Memorandum and Opinion at 4, 6). The court also found no need for an evidentiary hearing on the issue of scope, again because it believed the United States did not deny plaintiff's factual allegations. (*Id.* at 4). Finally, the court decided that since the United States was not a proper party defendant, the matter must be remanded to the state court. (*Id.* at 6, 7).

The United States moves the court to reconsider its rulings. First, the United States, as evidenced by the answer it filed herein and by the attached Declarations, vigorously contests plaintiff's allegations. At the least, the court should hold a hearing or otherwise further consider the evidence relating to scope, as Barry Haley has done nothing which can be construed to fall outside the scope of his employment.

The United States also notes that, if court reconsiders it rulings herein, allows the substitution, and grants the motion to dismiss, plaintiff would yet have remedies within the federal system. Although the dismissal would be with prejudice as to this action, under the Federal Tort Claims Act, plaintiff may file an administrative claim with the For-

est Service within two years of when her claim accrued. If denied, the claim could then be pursued in federal court under a separate action, provided the requirements of the Act are met.

ARGUMENT

I. THE UNITED STATES CONTESTED AND CONTINUES TO CONTEST PLAINTIFF'S ALLEGATIONS THAT BARRY HALEY ACTED OUTSIDE THE SCOPE OF HIS EMPLOYMENT.

A. The Answer Specifically Refutes Plaintiff's Allegations.

The United States filed its answer herein on May 19, 2003. (R. 7: Answer). In it, the United States denied each and every factual allegation by plaintiff against Barry Haley. Plaintiff's "First Cause of Action" is alleged against Luber alone. Plaintiff's "Second Cause of Action, Interference with Employment Relationship" is alleged against Haley alone. (R.1: Notice of Removal, Exhibit 1 (complaint) at 7, ¶¶ 27-31). The United States specifically denied the allegations contained therein. (R. 7: Answer at 3, ¶¶ 12-14). This includes a denial that Haley acted outside the scope of his employment. (R. 1: Notice of Removal, Exhibit 1 at 7, ¶ 29; R. 7: Answer at 3, ¶ 14).

Plaintiff's "Third Cause of Action, Conspiracy to Wrongfully Discharge Plaintiff" is alleged against both Luber and Haley. (*Id.* at 8, ¶¶ 32-38). The United States specifically denied the allegations contained therein. (R. 7: Answer at 3, ¶¶ 15-17). Plaintiff's "Fourth Cause of Action, Conspiracy to Interference with Plaintiff's Employment Relationship" is alleged against both Luber and Haley. (*Id.* at 10, ¶¶ 39-45). The United States specifically denied the allegations contained therein. (R. 7: Answer at 3-4, ¶¶ 18-20). This includes a denial that Haley acted outside the scope of his employment. (R. 1: Notice of Removal, Exhibit 1 at 10, ¶ 41; R. 7: Answer at 3, ¶ 19).

Plaintiff's "Fifth Cause of Action, Outrageous Conduct" is alleged against both Luber and Haley. (*Id.* at 11, ¶¶ 46-53). The United States specifically denied the allegations contained therein. (R. 7: Answer at 4, ¶¶ 21-23). Plaintiff's "Sixth Cause of Action, Conspiracy-Outrageous Conduct" is alleged against both Luber and Haley. (*Id.* at 13, ¶¶ 54-61). The United States specifically denied the allegations contained therein. (R. 7: Answer at 4, ¶¶ 24-26).

"The theory of Rules 8(b) and (d) is that a defendant's pleading should apprise the opponent of the allegations in the complaint that stand admitted and will not be in issue at trial and those that are contested and will require proof to established to enable plaintiff to prevail." *Wright & Miller*, 5 Fed. Prac. & Proc. Civ. 2d § 1261 at 1 (2004) (citing cases). The filing of a responsive pleading by the United States squarely placed in controversy the matters asserted in the complaint, and put all on notice that the United States contested plaintiff's allegations against Mr. Haley.

B. Both Barry Haley and Gaye Luber (now Gieselman) Contest Plaintiff's Allegations.

"Plaintiff's action is based on the fact that she was discharged from her employment at LBLA in retaliation for exercising her legal right in requesting an [Department of Labor] inquiry." (R. 18: Plaintiff's Reply to Motion to Dismiss at 3). The foregoing statement by plaintiff forms the gravamen of her entire complaint. (See R. 1: Notice of Removal, Exhibit 1 (complaint)).

Attached are Declarations from Barry Haley and Gaye Luber (now Gaye Gieselman) specifically contesting plaintiff's allegations that she was fired in retaliation for contacting the Department of Labor regarding consideration of her veteran's preference in connection with her application for a Forest Service position. In his Declaration, attached hereto as Exhibit 1, Barry Haley asserts that he is employed by the U.S. Department of Agriculture ("USDA") Forest Service as Business Manager at Land Between the Lakes National

Recreation Area. (Haley Declaration at ¶ 1). Mr. Haley further states that in Spring 2002, the USDA Forest Service advertised the position of Contracting Officer Trainee to work in the Business Department at Land Between The Lakes National Recreation Area. (*Id.* at ¶ 2). Mr. Haley states that applications for the position were received at the USDA Forest Service Regional Personnel Office in Atlanta, Georgia, for ranking and personnel certification. (*Id.*) The Personnel Office sent to Haley's office a personnel certificate ranking the candidates for the position. (*Id.*). By regulation, Mr. Haley could only consider the top three candidates, who were all highly qualified Veterans Preference candidates. (*Id.*). Pat Osborn was not listed as one of the top three candidates, Haley did not know she had applied for the position. (*Id.*). On May 20, 2002, Haley announced the selection of the new Contracting Officer Trainee. (*Id.* at ¶ 3). On June 17, 2002, he received a telephone call from Robert Kuenzli at the Department of Labor inquiring whether Pat Osborn's status as a veteran was considered in connection with the posting for the Contracting Officer Trainee position. (*Id.* at ¶ 4). After Haley's office faxed to him a copy of the personnel certificate, Mr. Kuenzli confirmed that the matter was handled correctly. (*Id.*).

Mr. Haley further states that, before Gaye Luber terminated Pat Osborn's employment with the Land Between the Lakes Association, he had no communication with Ms. Luber about the Department of Labor inquiry, or whether Osborn's veteran status was considered in connection with her application for Contract Officer Trainee. (*Id.* at ¶ 5). Mr. Haley states that he had no advance knowledge of the termination of Osborn's employment at LBLA, that he did not advise Gaye Luber regarding the matter, and that he did not attempt to influence her independent decision to fire Ms. Osborn. (*Id.* at ¶ 6).

Gaye Gieselman, formerly Gaye Luber, has also submitted a Declaration further controverting plaintiff's claims. See Declaration, attached hereto as Exhibit 2. Ms. Gie-

selman states that, acting as Executive Director of Land Between the Lakes Association, Inc., she terminated Pat Osborn from her employment with LBLA on June 19, 2002. (Gieselman Declaration at ¶ 2). She states that at the time she terminated Pat Osborn, she had no knowledge that Osborn had raised any sort of issue or had complained to anyone, either formally or informally, regarding whether her veteran's status was considered in the course of her job application with the Forest Service. (*Id.* at ¶ 3). At the time she terminated Pat Osborn, Gieselman had not discussed this issue with Barry Haley, Pat Osborn, or anyone else, and did not know it existed. (*Id.*).

Ms. Gieselman further states that, prior to Osborn's termination, Gieselman met with her on June 17 to discuss problems with her employment, and that her veteran's preference status was not mentioned at all during this meeting. (*Id.* at ¶ 4). She also states that Osborn's alleged complaint about consideration of her veteran status in applying for a Forest Service job was not, and could not have been, a factor in the decision to terminate Ms. Osborne [sic], because she, Ms. Gieselman, did not know about the complaint. (*Id.* at ¶ 5).

The foregoing Declarations by Barry Haley and Gaye Gieselman (formerly Gaye Luber) provide ample evidence that Barry Haley never acted outside the scope of his employment and directly and specifically controvert any allegations to the contrary.

II. BECAUSE THERE IS AN ISSUE OF MATERIAL FACT WITH REGARD TO WHETHER HALEY ACTED WITHIN THE SCOPE, THE COURT SHOULD FURTHER CONSIDER THE ISSUE, INCLUDING, IF NECESSARY, FURTHER DEVELOPMENT OF THE RECORD.

As shown above, the United States vigorously contests plaintiff's allegations that Barry Haley acted outside the scope of his employment. The United States respectfully

requests that the court revisit this issue and decide it in favor of the United States, based on its answer filed herein and on the additional evidence provided. Alternatively, the United States asks that the court allow limited discovery and/or hold an evidentiary hearing to resolve this issue.

As argued previously, plaintiff has not met her burden in attempting to contest the certification of scope. (R. 17: Reply at 2); *see also Schrob v. Catterson*, 967 F.2d 929, 935 (3d Cir. 1992) (if certification is challenged, plaintiff must come forward with specific facts rebutting the certification); *Raisig v. United States*, 34 F. Supp. 2d 1053, 1055 (W.D. Mich. 1998) ("The plaintiff must come forward with specific evidence or the forecast of specific evidence that contradicts the Attorney General's certification decision, not mere conclusory allegations and speculation." (citations omitted)). This burden must be met by a preponderance of the evidence. *Id.* at 1054. Here, the certification of the U.S. Attorney that Haley acted within scope, together with the Declarations of Haley and Gieselman (Luber), are sufficient to establish scope absent specific facts from plaintiff. If, as Mr. Haley and Ms. Gieselman both have stated, they had no communication regarding Osborn's veterans preference inquiry or her firing, then Haley cannot possibly have acted outside the scope of his employment. Plaintiff has put forward no facts sufficient to contest the showing that Haley acted within scope.

At the least, however, the court should find that the evidence now in the record presents a legitimate issue of material fact. If the court continues to believe that plaintiff has met her burden of putting forward specific facts supporting an argument that Haley acted outside the scope, then limited discovery may be indicated regarding the issue. *See, e.g., Maron v. United States*, 126 F.3d 317, 322 (4th Cir. 1997); *Melo v. Hafer*, 13 F.3d 736, 747 (3d Cir. 1994). Such discovery should be "circumscribed as narrowly as possible," and limited to scope of employment issues. *Schrob*, 967 F.2d at 936; *see also Maron*, 126 F.3d at 327; *Gutierrez de*

Martinez v. Drug Enforcement Administration, 111 F.3d 1148, 1154-55 (4th Cir. 1997).

Allowing limited discovery on the scope issue, including exploration of Osborn's employment record, could also reveal evidence supporting an argument that, even if the allegations are true, the alleged conduct falls within the relevant Kentucky law on scope. For example, plaintiff alleges that Haley influenced Luber to fire her because he was upset plaintiff filed a Department of Labor complaint. Assuming, for the sake of argument only, that Haley and Luber interacted regarding plaintiff's employment, Haley would conceivably know of any job-related problems that could have contributed to Osborn's firing, such as poor work performance, bad attitude, being a trouble-maker, or the like. In such a scenario, Haley's alleged conduct of causing Osborn's firing could be construed as for the benefit of the Forest Service, due to that entity's interest in not having its employees work closely with undesirable or poor-performing "Forest Service partners." Such conduct arguably would have taken place within the spacial and temporal limits of Haley's work, would be similar to his work as Business Manager, would further his employer's goals of partnering with competent contract employees in a healthy and productive work environment, and would not be unexpectable by the Forest Service. *See Booker v. GTE.net LLC*, 350 F.3d 515, 518-19 (6th Cir. 2003).

If, after discovery limited as described above, the court determines that a genuine issue of material fact remains, a pretrial hearing is indicated in order to resolve whether the United States should be substituted as the proper party defendant. *Taboas v. Mlynczak*, 149 F.3d 576, 580 (7th Cir. 1998). At such a hearing, the court would hear evidence from each party on the scope of employment issue. *Arthur v. United States*, 45 F.3d 292, 295 (9th Cir. 1995); *Melo*, 13 F.3d at 747; *Kimbro v. Velten*, 30 F.3d 1501, 1509 (D.C. Cir. 1994). As with discovery on the scope issue, any such hearing should be "narrowly circumscribed" and limited to the

facts in material dispute which have a bearing on scope of employment. *Schrob*, 967 F.2d at 936; *Gutierrez*, 111 F.3d at 1154-55.

Here, the court decided the scope issue against the United States without holding a hearing, stating the United States had not presented evidence contesting plaintiff's allegations. As argued above, the answer filed by the United States and the additional evidence submitted herewith demonstrate that the United States contests the allegations and that an issue of fact exists. Moreover, the case cited by this court in ruling that no evidentiary hearing was necessary seems to support the right of the United States to a hearing prior to any adverse ruling on scope. In the case of *Rutkofske v. Norman*, 114 F.3d 1188, 1997 WL 299382 (6th Cir. (Mich.) June 4, 1997), the court stated:

> The government supported its motion to dismiss with evidence—in the form of the certification—that [federal employee's] conduct was within the scope of his employment. Our prior cases make it clear that a plaintiff must submit relevant evidence in response to such a motion or face dismissal. Because Rutkofske failed to present any relevant evidence to oppose the motion, there was no fact at issue and no need to hold an evidentiary hearing.

Id. at **4. Respectfully, the above-cited section of the opinion appears to suggest that all the government need do to sufficiently support a motion to dismiss, is to file a certification of scope. If plaintiff then submits sufficient evidence in opposition, a hearing is warranted. As this court observed, the *Rutkofske* court noted that other courts addressing the issue have held a hearing necessary "only if there is conflicting evidence as to a material fact." *Id.*, citing *McAdams v. Reno*, 64 F.3d 1137, 1145 (8th Cir. 1995); *Kimbro*, 30 F.3d at 1509; *Melo*, 13 F.3d 747. However, the courts in two of the cited cases—as well as the *Rutkofske*

court—applied that test to plaintiff's failure to rebut the Attorney General's certification, not to the government. *McAdams*, 64 F.3d at 1145 (McAdams "failed to come forward with sufficient evidence to undermine" certification); *Kimbro*, 30 F.3d at 1509 (certification given *prima facie* effect "which obliges plaintiff to come forward after reasonable discovery with evidence supporting his allegations both as to scope and as to the merits"). The third case cited by *Rutkofske* may prove particularly instructive in the instant case. In *Melo*, 13 F.3d at 736, 747, plaintiff brought an action against a United States Attorney and others claiming that they conspired to interfere with her contractual relationships. *Id.* at 739. The district court concluded that for purposes of determining scope it must accept as true the facts alleged in the complaint. *Id.* at 740. Because the conduct alleged, if true, would have exceeded the scope of the U.S. Attorney's employment, the district court denied, without a hearing, the United States' motion to substitute. *Id.* at 741. Concluding "that a district court need not accept the allegations of the complaint as true when deciding a motion for substitution," the Third Circuit reversed and remanded for a hearing on the issue of scope. *Id.* at 739. This court should follow the same path as the court in *Melo*. To let stand its decision in this case would mean that all a plaintiff need do to defeat a substitution motion is to allege conduct on the part of a defendant which, if proven, would fall outside the scope of employment. A federal employee who legitimately contests said allegations, as here, is entitled to have the scope issue determined in a federal forum. *See, e.g., Kimbro*, 30 F.3d at 1505 (though scope question and merits in case "often overlap, sometimes exactly," Westfall statute precludes remand to state court before scope issue is resolved).

CONCLUSION

Based upon all of the foregoing, the United States respectfully requests that the court grant its motion to reconsider its Order entered March 12, 2004, overruling the

United States' motion to substitute itself as defendant, and denying its motion to dismiss. The United States respectfully requests that the court enter a finding that federal employee Barry Haley acted within the scope of his employment, substitute the United States, and dismiss the case. Alternatively, the United States asks the court to provide both parties the opportunity for discovery specifically limited to the issue of scope, and/or conduct an evidentiary hearing on that narrow issue.

Respectfully submitted,

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[Certificate of service omitted in printing]

[Exhibit 1]

DECLARATION PURSUANT TO 28 U.S.C. § 1746

1. I am Barry Haley, employed by the U.S. Department of Agriculture Forest Service as Business Manager at Land Between the Lakes National Recreation Area.

2. In Spring 2002, the USDA Forest Service advertised the position of Contracting Officer Trainee to work in my Business Department at Land Between The Lakes National Recreation Area. Applications for the position were received at the USDA Forest Service Regional Personnel Office in Atlanta, Georgia, for ranking and personnel certification. The Personnel Office sent to my office a personnel certificate ranking the candidates for the position. My consideration was limited by regulation to the top three candidates who were all highly qualified Veterans Preference candidates. Pat Osborn was not listed as one of the top three candidates, and I did not know she had applied for the position.

3. On May 20, 2002, I announced the selection of the new Contracting Officer Trainee.

4. On June 17, 2002, I received a telephone call from Robert Kuenzli at the Department of Labor. Mr. Kuenzli inquired whether Pat Osborn's status as a veteran had been considered in connection with the posting for the Contracting Officer Trainee position. My office faxed to him a copy of the personnel certificate on the position from the Forest Service Personnel Office. Mr. Kuenzli confirmed that the matter was handled correctly.

5. Before Gaye Luber terminated Pat Osborn's employment with the Land Between the Lakes Association, I had no communication with Ms. Luber regarding the Department of Labor inquiry to my office, nor regarding whether Osborn's veteran status was considered in connection with her application for Contract Officer Trainee.

6. I had no advance knowledge of the termination of Pat Osborn's employment with Land Between the Lakes Association. I did not advise Gaye Luber regarding the matter, nor did I attempt to influence her independent decision to fire Ms. Osborn.

Certification

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 22nd day of March, 2004.

/s/ Barry W. Haley
Barry Haley

[Exhibit 2]

DECLARATION PURSUANT TO 28 U.S.C. § 1746

I, Gaye Gieselman, do declare and state as follows:

1. I was known as Gaye Luber at the time of the events in question in this litigation.

2. Acting as Executive Director of Land Between the Lakes Association, Inc., I terminated Pat Osborn from her employment with LBLA on June 19, 2002.

3. At the time I terminated Pat Osborn, I had no knowledge that she had raised any sort of issue or registered any sort of complaint, formal or otherwise, to any person or entity, regarding whether her veteran's status was considered in the course of her job application with the Forest Service. At the time I terminated Pat Osborn, I had not discussed this issue with Barry Haley, Pat Osborn, or anyone else, and did not know it existed.

4. Prior to her termination, I met with Ms. Osborn on June 17 to discuss problems with her employment. Her veteran's preference status was not mentioned at all during this meeting.

5. Pat Osborn's alleged complaint about consideration of her veteran status in applying for a Forest Service job was not and could not have been a factor in my decision to terminate Ms. Osborne [sic], because I did not know it had occurred.

Certification

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 22 day of March , 2004.

/s/ Gaye Gieselman
Gaye Gieselman

[handwritten telephone number?]

GRANTED

(13)

FILED
JUL 14 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-593

In the Supreme Court of the United States

PAT OSBORN

Petitioner

v.

BARRY HALEY; GAYE LUBER; AND
LAND BETWEEN THE LAKES ASSOCIATION, INC.

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

When a federal employee is sued in a civil action in a state court, the Westfall Act, 28 U.S.C. § 2679(d)(2), authorizes the Attorney General to remove the action to federal district court—and seek to substitute the United States as the party defendant in place of the employee—by certifying that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." The petition presented the following two questions about the Act:

1. Whether the Westfall Act authorizes the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident solely by denying that such incident occurred at all.

2. Whether the Westfall Act forbids a district court to remand an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Act.

In granting the petition, the Court directed the parties to brief and argue the following additional question:

3. Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. § 1447(d).

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (Pet. App. 1a-11a) is reported at 422 F.3d 359. The two opinions of the District Court for the Western District of Kentucky (Pet. App. 12a-16a, 19a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2005. The petition for a writ of certiorari was filed on November 7, 2005; it was granted on May 15, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. This case involves the general remand statute, 28 U.S.C. § 1447, which provides in relevant part:

> (c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . .
>
> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

2. This case also involves a part of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680, formally called the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, but commonly known and cited as the "Westfall

Act" (Pet. App. 26a-30a). The immediately pertinent part of that Act, codified at 28 U.S.C. § 2679(d)(2), provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

Section 2679 is reproduced in whole in the Appendix hereto (App. 1a-3a).

STATEMENT OF THE CASE

1. On a narrow peninsula in western Kentucky, between Lake Barkley to the east and Kentucky Lake to the west, sits the Land Between the Lakes National Recreation Area ("LBL") operated by the U.S. Forest Service. At all relevant times, respondent Barry Haley was a Forest Service employee at LBL; respondent Gaye Luber was the executive director of respondent Land Between the Lakes Association, Inc. ("LBLA"), a private contractor that provided the Forest Service with staff for gift shops, visitor centers, and interpretive areas at LBL. Until petitioner was terminated in the events that gave rise to this case, she was an employee of LBLA. *See generally* Pet. App. 3a, 20a-21a.

2. Petitioner sued Luber and LBLA in Trigg County (Kentucky) Circuit Court, alleging that she was discharged from her job in violation of public policy. *See* Pet. App. 21a; *cf.* Brief in Opposition for Respondents [Luber and LBLA] ("Luber BIO") App. 1-15 (reproducing complaint). In that action, petitioner also sued Haley for wrongfully interfering with her employment relationship with LBLA, alleging that "Haley influenced LBLA . . . to fire her after she had a run-in with Haley." Pet. App. 3a. As so alleged, Haley's conduct violated "policies [that] prohibited Forest Service employees like Haley from 'participat[ing] in any LBLA decision concerning the relationship of the LBLA to the Forest Service, including but not limited to . . . hiring or firing LBLA employees.'" *Id.* (alterations in original). Indeed, as the court of appeals recognized, the Government (which is representing Haley) has "conceded that if Haley induced [petitioner's] firing, he acted *outside* the scope of his employment." *Id.* (emphasis added); *accord* Brief for Respondent Barry Haley at 14 n.5 (petition stage) (quoting the acknowledgment in the Government's brief in the court of appeals that "if Haley did cause [LBLA] to fire [petitioner], he acted outside the scope of his employment").

Despite this concession, the Attorney General—acting via the local United States Attorney, *see* 28 C.F.R. § 15.4(a) —issued a "certification that Haley had been acting *within* the scope of his employment at the time of the incident giving rise to [petitioner's] allegations." Pet. App. 3a (emphasis added); *cf.* Luber BIO App. 23 (reproducing certificate). Based on that certification, and invoking the Westfall Act, 28 U.S.C. § 2679, the Government removed the state-court action to the District Court for the Western District of Kentucky. *See* Pet. App. 3a. In that court, and again invoking the Act, the Government moved to substitute itself as a defendant in Haley's place and, thereafter, to dismiss the case on the ground that petitioner had failed to exhaust her administrative remedies as required by the FTCA, 28 U.S.C. § 2675(a). *See* Pet. App. 3a, 19a.

3. As the district court then understood it, the Government's motion required the court to "review the United States's certification that the alleged torts occurred within the scope of Mr. Haley's employment." Pet. App. 21a. Acting on the understanding that "the United States does not deny any of the factual allegations contained in [petitioner's] complaint," Pet. App. 22a, the court proceeded to apply the relevant law to the undisputed facts.[1] The court's conclusion: petitioner "has adequately alleged conduct on Mr. Haley's part that, if proven, would give rise to tort claims under Kentucky state law and that fall outside the scope of his employment with the United States Forest Service." Pet. App. 24a. Therefore, "Mr. Haley's alleged actions occurred outside the scope of his employment with the United States Forest Service," and so "the United States's certification is inappropriate and its motion to dismiss should be denied." *Id.*

Having decided that "the United States is not a proper party to this case," the district court then set about to "determine whether or not it has [subject matter] jurisdiction." *Id.* Observing that the "Sixth Circuit has not spoken to this issue and the authority among other circuits is split," the court agreed with a coordinate court in its circuit that "28 U.S.C. § 2679(d)(2) does not bar this Court from remanding an intentional tort action against a federal employee after

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[1] Under Sixth Circuit precedent, the relevant law was the law of Kentucky. *See, e.g., Flechsig v. United States*, 991 F.2d 300, 302 (6th Cir. 1993) (agreeing that "the determination of whether an employee of the United States acted within her scope of employment is a matter of state law"), *cited in* Pet. App. 21a. This apparently uniform rule among the courts of appeals derives from the text of the FTCA, *see* 28 U.S.C. § 1346(b)(1) (referring to "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment" and to "the law of the place where the act or omission occurred"), and from this Court's terse decision in *Williams v. United States*, 350 U.S. 857 (1955) (per curiam) ("This [FTCA] case is controlled by the California doctrine of respondeat superior.").

it has been determined that the employee was not acting within the scope of her employment." *Id.* (quoting *Allstate Insurance Co. v. Quick*, 254 F. Supp. 2d 706, 729 (S.D. Ohio 2002)). To the contrary, "remand is authorized by the general remand statute, [28 U.S.C.] § 1447(c), which states, in part: 'If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.'" Pet. App. 24a-25a (quoting *Allstate*, 254 F. Supp. 2d at 725, in turn quoting § 1447(c)). Because the United States was not a party, because the action presented no federal question, and because the remaining private parties were all citizens of Kentucky, the court ruled that it had "no jurisdiction over this case and [so] it must be remanded to the Trigg County [Kentucky] Circuit Court." Pet. App. 25a. The district court simultaneously issued an order that "this case is **REMANDED** to Trigg County Circuit Court." Pet. App. 17a.

4. The Government promptly filed a motion for reconsideration. *Cf.* J.A. 40-54 (reproducing motion, including its exhibits). The motion argued that the court's order was based on a critical mistake: while the court apparently believed that the Government "did not deny [petitioner's] factual allegations," it was actually the case that the Government, "as evidenced by the answer it filed herein and by the attached Declarations, vigorously contests [petitioner's] allegations." J.A. 41. Indeed, the Government adamantly asserted that "Barry Haley has done nothing which can be construed to fall outside the scope of his employment." *Id.*

But this assertion had an interesting twist. The gravamen of the motion was not that Haley's conduct actually fell "within" the scope of his employment, it was that Haley had actually "done nothing." Indeed, the Government relied heavily on a declaration by Haley stating "that he had no advance knowledge of the termination of [petitioner's] employment at LBLA, that he did not advise Gaye Luber regarding the matter, and that he did not attempt to influence her independent decision to fire [petitioner]." J.A. 44

(citing J.A. 52, ¶ 6).[2] As the court of appeals understood it, the Government's motion to reconsider basically "conceded that if Haley induced [petitioner's] firing, he acted outside the scope of his employment," but it adamantly "denied . . . that Haley interfered with Osborn's continued employment" at all. Pet. App. 3a.

5. In ruling on the Government's motion, the district court recognized that the legal terrain had shifted considerably. Rather than a certification that required the court to decide whether petitioner had "adequately alleged conduct on Mr. Haley's part that, if proven, would . . . fall outside the scope of his [federal] employment," Pet. App. 24a, the court now confronted a "Westfall Act certification[] based on an argument that no harm-causing incident ever took place," Pet. App. 14a; *accord* Pet. App. 2a (recognizing that in this action, the Attorney General had issued "a Westfall Act certification that denie[d] the occurrence of any injury-causing event"). As the court of appeals later observed, the district court regarded that certification as demanding "a decision on the merits of [petitioner's] claim, *i.e.*, whether the alleged harm-causing incident occurred at all," rather than "whether the *content* of the communications between LBLA and Haley was within his scope of [his] employment." Pet. App. 3a-4a.

How to deal with such a certification? Observing that "[t]here is a dispute among the circuits[,] which the Sixth

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[2] Haley stated categorically: "I had no advance knowledge of the termination of [petitioner's] employment with [LBLA]. I did not advise Gaye Luber regarding the matter, nor did I attempt to influence her independent decision to fire [petitioner]." J.A. 52, ¶ 6.

Interestingly, Luber's contemporaneously filed declaration did *not* contain a similarly categorical statement. Rather, Luber declared: "At the time I terminated [petitioner], I had not discussed *this issue* [i.e., petitioner's "veteran's status"] with Barry Haley, [petitioner], or anyone else, and did not know it existed." J.A. 53, ¶ 4 (emphasis added). Indeed, Luber's declaration pointedly did not specify her reason for terminating petitioner.

Circuit has not yet addressed," Pet. App. 14a, the district court looked first to the en banc decision of the First Circuit in *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993). In *Wood*, the court had "reviewed federal employee immunity from common law torts, the Westfall Act's text, and its legislative history, and found that 'the [Attorney General's certification] cannot deny the occurrence of the basic incident charged.'" Pet. App. 14a (quoting 995 F.2d at 1124). Thus, as perceived by the district court, *Wood* refused to "permit[] 'a Westfall Act certificate simply to deny that anything occurred.'" *Id.* (quoting 995 F.2d at 1128). On the other side, of the dispute, the "D.C. Circuit rejected the First Circuit's analysis in *Wood* . . . and concluded that the district courts must, if necessary, resolve the merits of the underlying dispute," namely, "whether or not the harm-causing incident took place." Pet. App. 15a (citing *Kimbro v. Velten*, 30 F.3d 1501, 1508-10 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995)).

The district court decided that "the *Wood* majority has the better of the interpretive dispute surrounding Westfall Act certifications." Pet. App. 16a. Thus, it concurred with the First Circuit that the Attorney General "cannot" issue an incident-denying certification, i.e., such a certification is not "permitt[ed]." Pet. App. 15a; *cf.* Pet. App. 4a (observing that the district court concluded that "it lacked authority to decide the scope question," as transformed by the incident-denying certification into a merits question). Therefore, the district court denied the Government's motion to reconsider and confirmed its decision to remand the case to the state courts. *See* Pet. App. 16a ("The United States's motion to stay remand of the case is **DENIED AS MOOT.**").

6. The Government appealed to the Court of Appeals for the Sixth Circuit. That court's opinion began by stating that the court confronted two issues in the appeal: (1) "the procedural ramifications attendant to a Westfall Act certification that denies the occurrence of any injury-causing event"; and (2) "the jurisdictional consequences of a denial

of substitution under the Act." Pet. App. 2a. Despite the seemingly categorical language of 28 U.S.C. § 1447(d), the court of appeals did not consider whether it had jurisdiction to review the district court's "order remanding [the] case to the State court from which it was removed."

As to the first issue, the Sixth Circuit "join[ed] the majority of the circuits . . . in holding that where the Attorney General's certification is based on a different understanding of the facts than is reflected in the complaint, including a denial of the harm-causing incident, the district court must resolve the factual dispute." Pet. App. 8a (citation omitted). Accordingly, the district court was directed to "resolve the factual disputes underlying the scope [of Haley's employment], including whether the alleged incident occurred" at all. Pet. App. 11a.

As to the second issue, the Sixth Circuit "agree[d] with the majority view that the clear language of the [Westfall] Act forecloses remand" to state court. Pet. App. 10a. Thus, "[e]ven if the district court finds that Haley acted outside the scope of his employment, it must nonetheless retain jurisdiction over this case." Pet. App. 11a.

7. Petitioner timely filed a petition for writ of certiorari, presenting two questions regarding the Westfall Act. In granting the petition, the Court directed the parties also to brief and argue the question "[w]hether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. § 1447(d)." *Supra* p. i.

SUMMARY OF ARGUMENT

1. Under the terms of § 1447(d)—namely, an "order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise"—the court of appeals lacked jurisdiction to review the district court's remand order. The statute applies to cases removed under specialized removal provisions like § 2679(d)(2), and it applies even (or especially) where a remand order "might be deemed erroneous." The *Thermtron* exception to § 1447(d)

is inapplicable, because the order here was based expressly (and in substance) on "lack of subject matter jurisdiction," one of the grounds enumerated in § 1447(c). The *Waco* exception is likewise inapplicable, because the order reviewed by the court below is undoubtedly a *remand* order that cannot be "disaggregated" from any antecedent decision.

2. On the merits, the Westfall Act does not authorize the Attorney General to issue an "incident-denying" certification. In denying any "incident" (and so denying that the defendant employee was "acting"), such a certification is inconsistent with the text of § 2679(d). By dispensing with a true scope-of-employment inquiry—the sole issue on which Congress wanted employee immunity to turn—an incident-denying certification also contravenes the statutory scheme of the Westfall Act, especially as that scheme is examined in light of the Act's history. Because such a certification entails a purely factbound judicial inquiry that raises no questions of federal law, it cannot be reconciled with the nature and operation of official immunity as revealed in numerous decisions of this Court. For the same reason, interpreting the Westfall Act to permit incident-denying certifications poses a serious risk of transgressing the limits on federal jurisdiction imposed by Article III of the Constitution.

3. Where removal is based upon a certification not authorized by the Westfall Act, the case *must* be remanded to state court. If the Attorney General lacks authority to issue an incident-denying certification, then he also lacks authority to remove a case based on that certification. Such a removal is "improper," and it obliges a remand under the terms of § 1447(c). This obligation is not overcome by language in the Act whereby a certification shall "conclusively establish scope of office or employment for purposes of removal," § 2679(d)(2), for an incident-denying certification is simply not a certification comprehended by that provision.

Therefore, the judgment of the court of appeals should be vacated for lack of jurisdiction. Alternatively, that judgment should be reversed on the merits.

ARGUMENT

We address first the jurisdictional question posed by the Court. We then proceed, in the alternative, to the two merits questions presented by the petition.

I. Under the Plain Terms of 28 U.S.C. § 1447(d), the Court of Appeals Lacked Jurisdiction to Review the District Court's Remand Order.

As this Court recently explained in *Kircher v. Putnam Funds Trust*, Congress has for more than a century "limited the power of federal appellate courts to review orders remanding cases removed by defendants from state to federal court." 126 S. Ct. 2145, 2152 (2006) (citing *United States v. Rice*, 327 U.S. 742, 748-52 (1946); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 346-48 (1976)). That limitation now appears at 28 U.S.C. § 1447(d), which provides (with an exception for certain civil rights cases) that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

As further explained in *Kircher*, the apparently categorical language of § 1447(d) is not actually so. This Court in *Thermtron* "held that the bar of § 1447(d) applies only to remands based on the grounds specified in § 1447(c), that is, a defect in removal procedure or lack of subject matter jurisdiction." *Kircher*, 126 S. Ct. at 2153. Nonetheless, the "*Thermtron* exception" to the bar of § 1447(d) is exceedingly narrow: the Court has "relentlessly repeated that 'any remand order issued on the grounds specified in § 1447(c) [is immunized from all forms of appellate review], whether or not that order might be deemed erroneous by an appellate court.'" *Id.* (alteration in original) (quoting *Thermtron*, 423 U.S. at 351). Consequently, if a district judge "purports to remand a case on the ground that it was removed 'improvidently and without jurisdiction,' his order is not subject to challenge in the court of appeals." *Id.* (quoting *Thermtron*, 423 U.S. at 343 (in turn quoting 1976 edition of § 1447(c))).

Kircher repeated another established precept, namely, the "bar of § 1447(d) applies equally to cases removed under the general removal statute, § 1441, and to those removed under other provisions." *Id.* (citing *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995)). In *Kircher*, the "other provision" was 15 U.S.C. § 77p(c), part of the Private Securities Litigation Reform Act of 1995. Here, of course, it is 28 U.S.C. § 2679(d)(2), part of the Westfall Act.

Given these precepts, what the Court said in *Kircher* may fairly be said in the present case: "Ostensibly, then, § 1447(d) stands in the way of reviewing the District Court's order[] of remand in the present case[]." 126 S. Ct. at 2153. In the first place, "[t]he District Court said that it was remanding for lack of jurisdiction, an unreviewable ground." *Id.*; *see also* Pet. App. 25a ("[T]his Court *has no jurisdiction over this case* and it must be remanded to the Trigg County Circuit Court." (emphasis added)); Pet. App. 4a (observing that the district court, "*concluding that it lacked jurisdiction*, remanded the action to state court" (emphasis added)). To say the same thing, the remand order was "issued on the grounds specified in § 1447(c)," and thus it is "immunized from all forms of appellate review." *Kircher*, 126 S. Ct. at 2153; *see also* Pet. App. 24a (agreeing with another district court that a "remand is authorized by the general remand statute, [28 U.S.C.] § 1447(c)").

Moreover, "even if it is permissible to look beyond the [district] court's own label, the [remand order is] unmistakably premised on the view that removal jurisdiction under [the governing statute] is limited to cases" of which this is not one. *Kircher*, 126 S. Ct. at 2153. As recounted above (pp. 6-7), the district court's "view" of removal jurisdiction under the Westfall Act came straight from the interpretation of the statute advanced by the en banc First Circuit in *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993). That is, having taken account of the "dispute among the circuits . . . about how courts should deal with Westfall Act certifications based on an argument that no harm-causing incident

ever took place," Pet. App. 14a, the district court concluded in its order denying the Government's motion to reconsider that "the *Wood* majority has the better of the interpretive dispute surrounding Westfall Act certifications," Pet. App. 15a.

As set out in detail in the following Part II (pp. 18-34), the view advanced by the *Wood* majority is that the Attorney General's certification under the Westfall Act "cannot deny the occurrence of the basic incident charged." *Wood*, 995 F.2d at 1124, *quoted in* Pet. App. 14a. Thus, *Wood* answered "no" to the question "whether the Attorney General may issue a Westfall Act certificate that simply denies that any injury-causing action occurred." *Id.* at 1123. Because the district court perceived the certification in the present case as denying that any "harm-causing incident ever took place," Pet. App. 14a, the remand order was unmistakably based on the court's conclusion that the Attorney General had tried to do exactly what he was not "permitt[ed]" to do, Pet. App. 15a. To use a formulation from one of this Court's opinions regarding removal jurisdiction, the district court concluded (rightly or wrongly, it remains to be determined) that the Attorney General "lacked authority" to issue the incident-denying certification regarding respondent Haley and, consequently, to remove this action against Haley to federal court. *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 87 (1991) ("*IPPL*").

In these circumstances, the basis for remand is fairly characterized as a "lack[of] subject matter jurisdiction" as that term is used in § 1447(c). As *IPPL* concluded: "Since the district court had no original jurisdiction over this case, . . . a finding that removal was improper [for lack of authority to remove] deprives that court of subject matter jurisdiction and obliges a remand *under the terms of § 1447(c)*." 500 U.S. at 87 (emphasis added). Alternatively, the basis for remand is fairly characterized as a "defect other than lack of subject matter jurisdiction" within the meaning of

§ 1447(c). The Third Circuit has observed that Congress's 1996 amendment of § 1447 "plainly effect[ed] a broadening of the scope of § 1447(c)—expanding its application to not just procedural defects, but any defects"—so that "the plain language of the amended statute now applies broadly to include all removals that are not authorized by law." *Cook v. Wikler*, 320 F.3d 431, 434-35 (3d Cir. 2003). Accordingly, if the district court "remanded this case to state court based upon [a] belief that the removal was 'not authorized by law' . . . such a 'defect' would fall within the 'basis' of § 1447(c) for which Congress has authorized remands to state court." *Id.* at 439.

But it really does not matter which characterization is superior. In either event, the basis for remand in this case was one of "the grounds specified in § 1447(c)." *Kircher*, 126 S. Ct. at 2153. In sum, "the result here is the same whether we look near or far": the remand order is "immunized from all forms of appellate review." *Id.* at 2153 & n.9.

Although the court of appeals below did not consider its own jurisdiction in light of § 1447(d), other courts of appeals have decided that orders remanding cases removed under the Westfall Act are indeed reviewable notwithstanding the bar of § 1447(d). Those decisions are grounded in two "exceptions" to that bar, which we confront in turn.

A. The *Thermtron* Exception Does Not Apply.

As recounted above, *Thermtron* "held that the bar of § 1447(d) applies only to remands based on the grounds specified in § 1447(c)." *Kircher*, 126 S. Ct. at 2153. Therefore, it may be said that the bar itself contains an "exception" for remand orders based on *other grounds*. This Court has consciously invoked the exception only twice in three decades. In *Thermtron* itself, the Court "approved appellate review of a remand expressly based on the District Court's crowded docket." *Id.* More recently, in *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 710-12 (1996), the Court undertook to review a remand order "based on abstention under

Burford v. Sun Oil Co., 319 U.S. 315 (1943)." *Kircher*, 126 S. Ct. at 2153.[3]

The Third and Fourth Circuits have relied on this exception to justify review of orders remanding cases removed under the Westfall Act. Deciding that "§ 1447(c) must be read together with § 2679(d)(2)," the Third Circuit reasoned that because the latter provision "expresses Congress's intent that subject matter jurisdiction is conclusively established upon the Attorney General's certification, . . . there is no jurisdictional question to be resolved by the district court" in a Westfall Act case. *Aliota v. Graham*, 984 F.2d 1350, 1357 (3d Cir.), *cert. denied*, 510 U.S. 817 (1993). For this reason, a court that has remanded such a case has by definition "remanded a properly removed case on grounds that [it] had no authority to consider," and so appellate review is "not barred by § 1447(d)." *Id.* (quoting *Thermtron*, 423 U.S. at 351). Likewise invoking *Thermtron*, the Fourth Circuit adopted the same reasoning: "Because § 2679(d)(2) 'conclusively' vests federal jurisdiction over a suit against a federal employee who[m] the Attorney General has certified 'was acting within the scope of his office or employment,' a district court has no authority to remand a case removed pursuant to that section, and the bar of § 1447(d) does not preclude [appellate courts] from reviewing [such] a remand

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[3] *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), is arguably another instance, if only a *sub silentio* one. There, without mentioning § 1447(d)—save to note that the court of appeals had dismissed the appeal in favor of a petition for mandamus on the basis that the statute "bars appeals from remands to state courts with a single exception not applicable to this case," *id.* at 617 n.4—the Court reviewed an order "remand[ing] a properly removed case to state court when all federal-law claims in the action ha[d] been eliminated and only pendent state-law claims remain[ed]." *Id.* at 345. *Cf. Things Remembered*, 516 U.S. at 130 (Kennedy, J., concurring) (observing that *Cohill* "did not find it necessary to decide whether [§ 1447(d)] would bar review of a remand on [specified] grounds, for [this Court] affirmed the denial of mandamus by the Court of Appeals").

order . . . ." *Borneman v. United States*, 213 F.3d 819, 826 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001).

With due respect to these courts of appeals, this logic does not hold up. In the first place, for an appellate court to say that "subject matter jurisdiction is conclusively established upon the Attorney General's certification" under the Westfall Act, *Aliota*, 984 F.2d at 1357, or to say (what amounts to the same thing) that such certification "conclusively establishes removal jurisdiction in the federal court," *Borneman*, 213 F.3d at 826, is self-evidently to say something about jurisdiction, particularly removal jurisdiction. But having an *unreviewable* say about its own jurisdiction on removal is precisely what § 1447(d) grants to a district court that enters a remand order. As *Kircher* put it, where such an order "is based on one of the [grounds enumerated in 28 U.S.C. § 1447(c)]"—which grounds expressly include that "the district court lacks subject matter jurisdiction"—"review is unavailable no matter how plain the legal error in ordering the remand." 126 S. Ct. at 2154 (alteration in original) (quoting *Briscoe v. Bell*, 432 U.S. 404, 413-14 n.13 (1977)). As the Third Circuit acknowledged (but chose not to heed), if there were an exception to the bar of § 1447(d) such that "anytime the district court misinterprets a jurisdictional statute [appellate courts] have authority to review the remand decision," the "exception would obviously swallow the rule." *Aliota*, 984 F.2d at 1357.

It does not add anything to say, as both the Third and Fourth Circuits did, that a district court has "no authority" to remand a case removed under the Westfall Act. *Aliota*, 984 F.2d at 1356; *Borneman*, 213 F.3d at 826. Even if that proposition were true—and petitioner vigorously disputes its truth, *see infra* Part III (pp. 34-41)—it would provide no basis for distinguishing cases removed under the Westfall Act from cases removed under any other statute. Doubtless it can be said that a district court has "no authority" to remand *any* properly removed case in disregard of Congress's grant of removal jurisdiction over that case. *Cf. Cohens v.*

Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("[Courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

But for purposes of § 1447(d), the pertinent question is not whether a district court had authority to remand the case; it is whether the court of appeals had authority to review the district court's remand order. Not only are these two questions analytically distinct, the answer to the latter does ***not*** depend on the answer to the former. As *Kircher* "relentlessly repeated" yet again, the bar of § 1447(d) operates "whether or not [the remand] order might be deemed erroneous by an appellate court." 126 S. Ct. at 2153 (quoting *Thermtron*, 423 U.S. at 351). Because that bar "applies equally to cases removed under the general removal statute . . . and to those removed under other provisions," *id.*; *see also, e.g., Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 & n.1 (9th Cir. 2006) (ruling that § 1447(d) barred review of order remanding a case removed under § 1442(a)(1), the federal officer removal statute), the *Thermtron* exception does not apply here *even if* the district court's order of remand "might be deemed" contrary to § 2679(d)(2).

B. The *Waco* Exception Does Not Apply.

In justifying their review of orders remanding actions removed under the Westfall Act, the Third and Fourth Circuits also relied on this Court's decision in *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). *See Aliota*, 984 F.2d at 1353; *Borneman*, 213 F.3d at 825. In so doing, these courts followed the lead of the Fifth Circuit in *Mitchell v. Carlson*, 896 F.2d 128, 132 (5th Cir. 1990); *see also Kimbro*, 30 F.3d at 1503 (relying on *Waco*, *Aliota*, and *Mitchell* in a Westfall Act case). As before, *Kircher* supplies the framework for evaluating this alleged exception to the governing statutory bar: "Without passing on the continued vitality of [the *Waco*] case in light of § 1447(d), we note that on its own terms it is distinguishable." 126 S. Ct. at 2156 n.13.

First, "[t]he order appealed in *Waco* was not a remand order; the order here is." *Id.*; *see also* Pet. App. 17a ("IT IS **ORDERED** that . . . this case is **REMANDED** to Trigg County Circuit Court"). The Sixth Circuit obviously thought it was reviewing a remand order. *See* Pet. App. 8a ("Defendants additionally argue that . . . the district court . . . erred in remanding the case to state court."); Pet. App. 10a ("We agree with the majority view that the clear language of the [Westfall] Act forecloses remand. We thus also agree with Defendants that the district court lacked authority to remand the action."). *Waco* acknowledged that such an order "'cannot [be] affect[ed]' notwithstanding any reversal of a separate order." *Kircher*, 126 S. Ct. at 2156 n.13 (quoting *Waco*, 293 U.S. at 143).

Second, and in any event, there is no "separate" order here; as in *Kircher*, the "remand order here cannot be disaggregated as the *Waco* orders could." *Id.* To be sure, the cited decisions of the courts of appeals say otherwise. Thus, the Fifth Circuit relied on *Waco* in finding "appellate jurisdiction to review the portion of the district court's . . . order, *separable from the remand portion*, that vacated its previous order substituting the United States for [the employee] and resubstituted [the employee] as defendant." *Mitchell*, 896 F.2d at 132 (emphasis added). So did the Fourth Circuit in distinguishing the remand order from "antecedent rulings rejecting the United States' certification and its substitution as the defendant." *Borneman*, 213 F.3d at 824.

The distinction proffered by these courts—between an "antecedent" order rejecting the Attorney General's certification (and thereby rejecting the attempted substitution of the United States for the employee) and a subsequent, separable remand order—does not hold up in the present case. As explained in detail above (pp. 11-12), the district court in the end did not reject the Attorney General's certification because the court thought it "erroneous" (in the sense that respondent Haley had acted *outside* rather than *within* the scope of his employment). No, the court ultimately rejected

the certification here because the court decided, following the lead of the First Circuit in *Wood v. United States*, that the Attorney General lacked authority to issue an incident-denying certification or (to say the same thing) that such a certification was not authorized by law. In these circumstances, the district court's rejection of the certification (and consequent substitution) and the court's decision to remand were "inextricably linked" to one another. *Aliota*, 984 F.2d at 1353. In other words, the two "cannot be disaggregated," making *Waco* distinguishable, whatever the decision's continuing vitality. *Kircher*, 126 S. Ct. at 2156 n.13.[4]

For all these reasons, 28 U.S.C. § 1447(d) deprived the court of appeals of jurisdiction to review the district court's remand order. Consequently, the judgment of the court of appeals should be vacated for lack of jurisdiction, and the judgment of the district court remanding this case to Trigg County Circuit Court should be reinstated.

II. The Westfall Act Simply Does Not Authorize the Attorney General to Issue an "Incident-Denying" Certification.

In the proceedings below, the Government "conceded that if Haley induced [petitioner's] firing, he acted outside the scope of his employment." Pet. App. 3a. At the same time, however, the Government "denied . . . that Haley interfered with [petitioner's] continued employment." *Id.* In particular, the Government argued in its motion for recon-

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[4] For the sake of completeness, we note that "the force of the bar [of § 1447(d)] is not subject to any statutory exception that might cover this case." *Kircher*, 126 S. Ct. at 2153. Any such exception is necessarily grounded in a "'clear statutory command'" whereby Congress can be said to have "expressly made 28 U.S.C. § 1447(d) inapplicable to particular remand orders." *Id.* n.8 (quoting *Things Remembered*, 515 U.S. at 128); *cf., e.g.*, 25 U.S.C. § 487(d) ("*Provided*, That the United States shall have the right to appeal from any order of remand in the case."), *cited in Kircher*, 126 S. Ct. at 2153 n.8. No clear and express command of this kind appears in the Westfall Act.

sideration in the district court that Haley declared under oath "that he had no advance knowledge of the termination of [petitioner's] employment at LBLA, that he did not advise Gaye Luber regarding the matter, and that he did not attempt to influence her independent decision to fire [petitioner]." J.A. 44. In truth, therefore, the Attorney General issued what the court of appeals called a "Westfall Act certification that denie[d] the occurrence of any injury-causing event," Pet. App. 2a, or more tersely, an "incident-denying" certification, Pet. App. 5a.[5]

What exactly does this mean? As the court of appeals noted, "the Attorney General's scope-of-employment certification may be judicially reviewed—a plaintiff may challenge the scope certification and expect resolution of that issue by the district court." Pet. App. 4a (citing *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995)). Where, as here, "the Attorney General's scope certification amounts to a denial that any wrongdoing occurred," *id.*, the resulting adjudication by the district court would necessarily consist of "deciding whether the employee committed the wrong the plaintiff alleges," Pet. App. 5a. In other words, it would "requir[e] a decision on the merits of [petitioner's] claim, *i.e.*, whether the alleged harm-causing incident occurred at all." Pet. App. 3a-4a; *accord* Pet. App. 11a (remanding to district court to resolve "whether the alleged incident occurred").

Other courts of appeals share the Sixth Circuit's understanding of incident-denying certifications. Thus, the D.C. Circuit has described a class of Westfall Act cases in

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[5] The district court likewise recognized that the Attorney General had certified that "no harm-causing incident ever took place." Pet. App. 14a. In *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 421 (1995), the "certification, as is customary, stated no reasons for the U.S. Attorney's scope-of-employment determination." Here, the certification is similarly conclusory. *See* Luber BIO App. 23. Consequently, the "incident-denying" character of the certification does not appear on the face of the document; that character was revealed in the crucible of litigation in the district court.

which the Government, "faced with an allegation of an intentional tort on the part of its employee, if it concludes that the tort did not take place, will understandably assert that the employee was acting within his or her scope of office or employment . . . and deny the tort occurred." *Kimbro*, 30 F.3d at 1505. In such a case, "the scope question and the merits often overlap—sometimes exactly," *id.*—such that "to resolve the disputed factual issue" is "really [to resolve] the whole case." *Id.* at 1507; *see also id.* at 1508 (deciding that the Westfall Act contemplates judicial review "of the *underlying merits*" regardless of "what the certification actually says—*i.e.*, whether it denies or recharacterizes the plaintiff's allegations of the employee defendant's conduct"). The Third Circuit has held that the Attorney General may issue a certification in "cases in which the plaintiff alleges conduct which is beyond the scope of the defendant's employment, but which the Attorney General determines did not occur." *Melo v. Hafer*, 13 F.3d 736, 747 (3d Cir. 1994). In such cases, "the district court will resolve all issues of fact or law relevant to that issue," *id.*, which will necessarily include "find[ing] facts that are part of the plaintiff's case on the merits," *id.* at 748 n.8.

As explained below, however, the Westfall Act does not authorize the Attorney General to issue certifications of the type here described. This is not to argue that the certification in this case was "wrong" in the sense that Haley really *did* interfere with petitioner's employment at LBLA. (As will become evident, petitioner means to prove that point to a jury of her peers in Trigg County Circuit Court.) Rather, it is to argue that in issuing an incident-denying certification (in this case and others), the Attorney General has attempted to do something the Westfall Act categorically does not permit him to do. As the First Circuit put the point in agreeing with the Second Circuit, "the Act does not permit the government to certify that the alleged incident is 'within the scope of employment' simply 'by denying that the acts occurred.'" *Wood v. United States*, 995 F.2d 1122 (1st Cir.

1993) (en banc) (quoting *McHugh v. University of Vermont*, 966 F.2d 67, 74 (2d Cir. 1992)).[6]

Then-Chief Judge Breyer framed the issue in *Wood*:

> This appeal focuses on whether the Attorney General may issue a Westfall Act certificate that simply denies that any injury-causing action occurred. Suppose a plaintiff claims that a federal employee committed acts clearly outside the scope of employment . . . . Can the Attorney General certify that there simply was no such event? To rephrase this question using the statutory terms [from 28 U.S.C. § 2679(d)(1), (2)]: Can the certificate grant immunity simply by denying the occurrence of any "incident out of which the claim arose?" Would such a certificate fall within the scope of the immunity statute?

995 F.2d at 1124. *Wood* held that "the answer is 'no.'" *Id.* *That answer is correct*—and it is compelled by the specific language of § 2679(d), the statutory scheme of the Westfall Act and Federal Tort Claims Act, the history of the Westfall Act, the nature and operation of official immunity, and the Article III problem that a contrary answer would raise.

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[6] As an action commenced in federal court, *Wood* was governed by paragraph (1) of § 2679(d); as actions commenced in state court, *McHugh* was, and the present case is, governed by paragraph (2) of that subsection. For present purposes, the relevant portions of the respective paragraphs are virtually identical:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim . . . shall be deemed [to be] an action [or proceeding brought] against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

The bracketed text appears only in paragraph (2).

A. The Specific Language of 28 U.S.C. § 2679(d).

As *Wood* observed, the "Westfall Act itself says that, to provide immunity, the Attorney General must certify that the defendant employee was 'acting within the scope of his office or employment at the time of the incident out of which the claim arose.'" 995 F.2d at 1124 (quoting § 2679(d)(1), (2)). It is quite "natural to read these words as speaking of an action 'at the time of the incident,' thus assuming some kind of 'incident' occurred." *Id.* By definition, however, an incident-*denying* certification controverts this statutory assumption.

The words of the statute also assume that the defendant employee was "acting"—and permit the Attorney General (subject to review in the district court) to characterize that action as "within the scope of [the employee's] office or employment." But an incident-denying certification controverts the assumption of employee action and (as elaborated in the following section) actually dispenses with the "scope" issue altogether.

In the present case, for example, the Government asserted that Haley "has done nothing which can be construed to fall outside the scope of his employment," J.A. 41, and that he "never acted outside the scope of his employment," J.A. 45. Although these assertions make reference to "scope of employment," that reference is a diversion: the Government's essential point was that Haley had "done nothing" and had "never acted" vis-à-vis petitioner. Thus, the Government reasoned: "If, as Mr. Haley and Ms. [Luber] both have stated, they had no communication regarding [petitioner's] veterans preference inquiry or her firing [that is, if Haley *did nothing*], then Haley cannot possibly have acted outside the scope of his employment." J.A. 46.

Therefore, in denying that any "incident" occurred, and in denying that the defendant employee was ever "acting" vis-à-vis the plaintiff, an incident-denying certification is inconsistent with the text of § 2679(d).

B. The Statutory Scheme of the Westfall Act and the Federal Tort Claims Act.

In *Lamagno*, the Court crystallized the relevant statutory scheme: "The certification, removal, and substitution provisions of the Westfall Act, 28 U.S.C. §§ 2679(d)(1)-(3), work together to assure that, when scope of employment is in controversy, that matter, *key to the application of the FTCA*, may be resolved in federal court." 515 U.S. at 430-31 (footnote omitted and emphasis added). The scope of employment is the "critical . . . inquiry" or "key question," *id.* at 426, 430, precisely because "'[s]cope of employment' sets the line." *Id.* at 423. If a federal employee "is inside that line, he is not subject to [civil] suit; if he is outside the line, he is personally answerable." *Id.* (construing § 2679(b)(1)). That is, the Westfall Act establishes "absolute immunity for Government employees . . . for torts committed by [them] *in the scope of their employment*"—and not otherwise. *United States v. Smith*, 499 U.S. 160, 163 (1991) (emphasis added). Thus, "the significance of the scope-of-employment inquiry" is that Congress "wanted the employee's personal immunity to turn on that question alone." *Lamagno*, 515 U.S. at 426.

1. An incident-denying certification, and the attendant review of such a certification in court, would have the employee's personal immunity turn on "whether the alleged harm-causing incident occurred *at all*," Pet. App. 3a-4a (emphasis added), rather than whether such incident occurred "*within* the scope of his office or employment," § 2679(d)(2) (emphasis added). Here, the Sixth Circuit would have the district court decide whether "Haley influenced LBLA . . . to fire [petitioner] after she had a run-in with Haley." Pet. App. 3a. No "scope" inquiry is even contemplated, the Government having "conceded that if Haley induced [petitioner's] firing, he acted outside the scope of his employment." *Id.* Likewise, in *Melo*, the Third Circuit remanded the case for the district court to decide whether in fact the defendant federal employee "had turned over a list of suspected jobbuyers within the Auditor General's Office in order to assist

Barbara Hafer in her political campaign for Auditor General." 13 F.3d at 741. Again, no "scope" inquiry was even contemplated, for the defendant employee conceded that he "would not have been acting within the scope of his employment if" he had done such a thing. *Id.*

These cases illustrate that an incident-denying certification simply does not pose the question on which Congress wanted personal immunity *alone* to turn. That is, the judicial inquiry generated by such a certification is not truly a *scope-of-employment* inquiry; it is an "inquiry into merits facts." *Id.* at 746. As so revealed, an incident-denying certification distorts the above-described statutory scheme of the Westfall Act at the most basic level.

2. To be sure, some judges have conflated these two types of inquiry, or treated the latter as comprehending the former. *See, e.g., id.* at 747 (contemplating that "findings necessary to a determination of the scope of employment issue" would include a "determination as to whether [the employee] supplied Hafer . . . with information concerning the plaintiffs"); *Wood*, 995 F.2d at 1134 (Coffin, Selya, and Boudin, JJ., dissenting) (envisioning a unitary "determination as to what did or did not occur and its relationship to [the defendant's] office or employment"). But the distinction between a true scope-of-employment inquiry and the fundamentally different inquiry entailed by an incident-denying certification emerges clearly when one examines the applicable law, i.e., state agency law. *See supra* note 1 (p. 4).

For example, under Kentucky law as perceived by the district court, a court "must ask four questions to determine whether or not [an employee] acted within the scope of his employment"; those questions concern the typicality, location, timing, purpose, and foreseeability of the employee's "conduct" or "actions." Pet. App. 23a. It should be apparent that evaluating the various characteristics of an employee's actions is decidedly not the same as determining whether those actions were undertaken at all. Yet the Government

devoted its motion to reconsider not to the legal question whether, under Kentucky law, Haley was acting "*within* the scope of his office or employment at the time of the incident out of which the claim arose," § 2679(d)(2) (emphasis added), but instead to the purely factual question whether the incident occurred at all.[7]

Under Virginia law as applied by the Fourth Circuit on remand from this Court in *Lamagno*, a particular act is within the scope of employment if (1) the act "was expressly or impliedly directed by the employer, or is naturally incident to the business," and (2) it "was performed, although mistakenly or ill-advisedly, with the intent to further the employer's interest." *Gutierrez de Martinez v. Drug Enforcement Administration*, 111 F.3d 1148, 1156 (4th Cir.) (quoting *Kensington Associates v. West*, 362 S.E.2d 900, 901 (Va. 1987)), *cert. denied*, 522 U.S. 931 (1997). Again, it should be apparent that evaluating whether an act was "directed by the employer, or is naturally incident to the business," and

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[7] *See* J.A. 41 ("[T]he United States, as evidenced by the answer it filed herein and by the attached Declarations, vigorously contests plaintiff's allegations."); J.A. 42 (arguing that it "denied each and every factual allegation by plaintiff against Barry Haley"); J.A. 43-45 (arguing numerous factual points based on the attached declarations of Haley and Luber); J.A. 46 (arguing that "Plaintiff has put forward no facts sufficient to contest" the Attorney General's certification); J.A. 48 (arguing that its answer "and the additional evidence submitted herewith demonstrate that the United States contests the allegations and that an issue of fact exists").

To be sure, the Government devoted one paragraph to speculating that limited discovery could "reveal evidence supporting an argument that, even if [petitioner's] allegations are true, [Haley's] alleged conduct falls within the relevant Kentucky law on scope [of employment]." J.A. 47. The district court rejected this line of argument, refusing to credit "factual arguments made in the alternative when one version is made under oath subject to perjury, i.e., Mr. Haley's declaration, and the other version merely suggested." Pet. App. 14a. As documented above (p. 3), the Government abandoned this line of argument in the court of appeals.

whether an act was performed "with the intent to further the employer's interest," is an inquiry very different in kind from determining whether the act was performed at all.[8]

3. An incident-denying certification also distorts the statutory scheme in relation to substitution. The Court has explained that "[w]hen the Attorney General has granted certification"—and that certification is upheld on judicial review—"the United States will be substituted as the party defendant" both in cases originally filed in federal court and in those removed from state court. *Lamagno*, 515 U.S. at 431-32. "Ordinarily," such a substitution will "occasion no contest," for although it "relieves the employee of responsibility, plaintiffs will confront instead a financially reliable defendant." *Id.* at 422. To be sure, in some cases (including *Lamagno*) "substitution of the United States would cause the demise of the action." *Id.* But this demise results not from certification and substitution per se but instead from the rule that, upon substitution, "the action 'shall proceed in the same manner as any action against the United States . . . and shall be subject to the limitations and exceptions applicable to those actions.'" *Id.* (quoting § 2679(d)(4)); *cf. id.* (observing that the plaintiffs' "claims 'arose in a foreign country,' FTCA, 28 U.S.C. § 2680(k), and thus fell within an exception to the FTCA's waiver of . . . sovereign immunity").

Yet the substitution that takes place when an incident-denying certification is upheld—i.e., when the district court determines that the alleged harm-causing incident did *not* occur at all—is categorically an idle act. The Government need not even bother to assert the "limitations and exceptions" of the FTCA, because the case will already have been

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[8] In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), a Title VII case, the Court conducted a scope-of-employment inquiry and ultimately concluded that "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment." *Id.* at 757. The inquiry pointedly did not determine whether such harassment had occurred in the pending case, but proceeded "assum[ing] discrimination can be proved." *Id.* at 754.

decided against the plaintiff *on the merits*. *See, e.g.*, Pet. App. 15a (recognizing that to determine "whether or not the harm-causing incident took place" is to "resolve the merits of the underlying dispute"). It makes no sense to permit the kind of certification that will, if upheld, *always* result in the action's being dismissed rather than its proceeding against the Government as the party defendant. As *Wood* reasoned: "Since Congress intended to limit grants of immunity to job-related, respondeat superior, kinds of cases, there is no reason to apply the Westfall Act in cases that concededly do not involve any kind of *potential* respondeat superior liability." 995 F.2d at 1126 (emphasis added).

In sum, by dispensing with a true scope-of-employment inquiry and by creating a class of cases in which substitution would be an idle act, an incident-denying certification contravenes the statutory scheme of the Westfall Act and the Federal Tort Claims Act.

C. The History of the Westfall Act.

As this Court has observed, when "Congress wrote the Westfall Act, . . . the legislators had one purpose firmly in mind," namely, "to override *Westfall v. Erwin*, 484 U.S. 292 (1988)." *Lamagno*, 515 U.S. at 425. *Westfall* had held that in order "to gain immunity from suit for a common-law tort, a federal employee would have to show (1) that he was acting within the scope of his employment, and (2) that he was performing a discretionary function." *Id.* at 425-26 (citing *Westfall*, 484 U.S. at 299). In the wake of that ruling, "Congress reacted quickly to delete the 'discretionary function' requirement, finding it an unwarranted judicial imposition." *Id.* at 426. But Congress did not give federal employees an overriding, blanket immunity from *all* civil actions. Rather, Congress concentrated on "the scope-of-employment inquiry —that is, it wanted the employee's personal immunity to turn on that question alone." *Id.* As the Act itself declares, its purpose is "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the

common law torts of Federal employees with an appropriate remedy against the United States." Westfall Act, § 2(b), 102 Stat. at 4564, *reproduced in* Pet. App. 27a.

In this light of this history, *Wood* "examined the pre-Westfall Act cases" and found that the "leading immunity cases all involved 'incidents' that defendants conceded to have occurred." 995 F.2d at 1127 (citing *Westfall* itself; *Barr v. Matteo*, 360 U.S. 564 (1959); and *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)). Moreover, "in every other case [the court] found, the parties conceded or assumed for immunity-conferring purposes the occurrence of some kind of harm-causing 'act or omission,'" and the court "could find no contrary example of either an ordinary or a 'constitutional' tort case in which a claim of immunity rested on a denial that any incident occurred." *Id.*; *cf. Melo*, 13 F.3d at 745 (noting that "in the pre-Westfall era, [the defendant employee] was not entitled to have the judge resolve any material disputes of fact presented by the summary judgment record"). Given the statute's important but narrow focus—"delet[ing] the 'discretionary function' requirement" imposed by the *Westfall* decision, *Lamagno*, 515 U.S. at 426—*Wood* correctly concluded that nothing in the Act's history "suggests that Congress wanted to change the pre-existing practice" by permitting immunity to rest on a denial that any incident occurred. 995 F.2d at 1127.[9]

D. The Nature and Operation of Official Immunity.

It is evident from the foregoing that the Westfall Act creates a species of *official immunity*, specifically "absolute

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[9] *Wood* also observed that cases arising under the Westfall Act's predecessor—the Federal Drivers Act, Pub. L. No. 87-258, § 1, 75 Stat. 539, 539 (1966) (formerly codified at 28 U.S.C. § 2679(d))—likewise "turned on whether the 'incident' (essentially an auto accident) fell within the 'scope of employment,' not on whether any basic incident occurred." 995 F.2d at 1128. While noting the differences between the two statutes, *Lamagno* relied on the Drivers Act as an aid to construing the Westfall Act. *See* 515 U.S. at 425.

immunity for Government employees . . . for torts committed by [those] employees in the scope of their employment." *United States v. Smith*, 499 U.S. at 163. The Government has previously argued that this absolute immunity "closely resembles the qualified immunity from constitutional torts addressed in" *Hunter v. Bryant*, 502 U.S. 224 (1991), and many other decisions. Proof Brief for Defendant-Appellee Barry Haley at 16; *see also id.* (referring to "the closely related area of qualified immunity in suits for constitutional torts"). The Government's point is a sound one, especially given this Court's holding that "qualified immunity shares [an] essential attribute of absolute immunity"—that each is "in fact an entitlement not to stand trial under certain circumstances." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985).

In this light, it is worthwhile to consider the pending question through the lens of this Court's rich jurisprudence of official immunity, both absolute and qualified. In three respects, that jurisprudence buttresses the conclusion that the Westfall Act does not authorize the Attorney General to issue an incident-denying certification.

1. *Mitchell* taught that "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim." *Id.* at 527, *quoted in Johnson v. Jones*, 515 U.S. 304, 314 (1995); *accord, e.g., Wyatt v. Cole*, 504 U.S. 158, 166 (1992) (distinguishing "immunity from suit" from "a mere defense to liability"); *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996) (observing that immunity is an entitlement that is "distinct from the merits"); *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) (pointing out that "a distinction exists between an 'immunity from suit' and other kinds of legal defenses"). As the Fifth Circuit has recognized, the import of this conceptual distinction is that "[a] public official who attacks a plaintiff's ability to prove her case is *not* raising a qualified immunity defense." *Hare v. City of Corinth*, 135 F.3d 320, 328 (5th Cir. 1998) (emphasis added). In the same vein, the Seventh Circuit has recognized that "the immunity defense is unavailable" regarding "whether the defendants did the

deeds alleged." *Elliott v. Thomas*, 937 F.2d 338, 341 (7th Cir. 1991), *cert. denied*, 502 U.S. 1074, 1121 (1992).[10]

As documented above, however, attacking a plaintiff's ability to prove her case is precisely the function (indeed, the only function) of an incident-denying certification. *See supra* pp. 19-20. Moreover, because it raises the question (indeed, only the question) whether the defendants did the deeds alleged, an incident-denying certification simply does not raise an immunity defense.

2. *Mitchell* also established that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." 472 U.S. at 530. The Court returned to this issue in *Johnson v. Jones*, considering "the appealability of a portion of a district court's summary judgment order that, though entered in a 'qualified immunity' case, determines only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial." 515 U.S. at 313. The Court unanimously ruled that this kind of order is *not* appealable. The Court's first reason for this ruling goes to the nature of the immunity determination: "a qualified immunity ruling . . . is . . . a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." *Id.* (alterations in *Johnson*) (quoting *Mitchell*, 472 U.S. at

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[10] *See also, e.g., Stephenson v. Doe*, 332 F.3d 68, 78 (2d Cir. 2003) (distinguishing between "the question of whether the plaintiff's constitutional rights were violated" and "the question of whether the officer was entitled to qualified immunity"); *Dolson v. Village of Washingtonville*, 382 F. Supp. 2d 598, 601-02 (S.D.N.Y. 2005) ("A defendant's assertion that the plaintiff's constitutional rights were not violated, or that [plaintiff's] version of events is wrong, does not go to the question of whether the officer was entitled to qualified immunity. . . . If plaintiff's version of the facts is wrong and defendant's is correct, then the defendant will prevail, not because of qualified immunity, but because he did nothing wrong.").

530 n.10). Accordingly, "an appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts." *Id.* (quoting *Mitchell*, 472 U.S. at 528).

By contrast, an incident-denying certification necessarily requires the district court to "resolve the factual dispute" about the merits of the plaintiff's claims in order to grant or deny the protection of the Westfall Act. Pet. App. 8a; *see also* Proof Brief for Defendant-Appellant Barry Haley at 22 (contending that "the district court had to address"—at the *immunity* stage (and without discovery)—"whether Haley committed the acts alleged in the complaint"). Such a requirement cannot be squared with *Mitchell*'s and *Johnson*'s precepts that immunity is "a legal issue that can be decided with reference only to undisputed facts" and that the court considering immunity "need not consider the correctness of the plaintiff's version of the facts."

3. This Court returned to the relationship between an immunity defense and the merits of the plaintiff's claim in *Crawford-El v. Britton*, 523 U.S. 574 (1998). The Court distinguished between the "plaintiff's showing of improper intent (a pure issue of fact)" and "the separate qualified immunity question whether the official's alleged conduct violated clearly established law, which is an 'essentially legal question.'" *Id.* at 589 (quoting *Mitchell*, 472 U.S. at 526). Moreover, the Court observed that it "has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action." *Id.* (quoting *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). The Court also reiterated that in order to resolve an immunity defense, a district court "must determine whether, *assuming the truth of the plaintiff's allegations*, the official's conduct violated clearly established law." *Id.* at 598 (emphasis added); *accord, e.g., Saucier v. Katz*, 533 U.S. 194, 201 (2001) (ruling that a "court required to rule upon the qualified immunity issue must consider" the facts "in the light most favorable to the party asserting the injury").

By definition, an incident-denying certification takes just the opposite tack. Rather than assuming the truth of the plaintiff's allegations—and asserting that the alleged conduct occurred *within* the defendant employee's scope of employment—such a certification necessarily denies the allegations. Moreover, when the matter reaches the district court, an incident-denying certification steers the judicial inquiry toward the "pure issue[s] of fact" that underlie the plaintiff's claim and away from the "essentially legal question[s]" that are the hallmark of immunity defenses. *See, e.g., Kimbro*, 30 F.3d at 1502 (forcing the district court to decide between (1) the plaintiff's allegation that the defendant "without provocation . . . viciously struck [her] on the right arm," and (2) the employee's "sworn declaration claiming that she did not recall ever touching" the plaintiff).[11]

The Westfall Act creates a species of official immunity for federal employees. Yet an incident-denying certification cannot be squared with the nature and operation of official immunity as explicated by this Court.

E. The Article III Problem.

In *Lamagno*, a four-Justice plurality confronted what the amicus curiae called "a potentially serious Article III problem." 515 U.S. at 434. The amicus argued that if the Attorney General's certification is rejected on judicial review, and if there is no diversity of citizenship among the parties, "then the federal court will be left with a case without a federal question to support the court's subject-matter jurisdiction." *Id.* at 434-35. The plurality denied the gravity of the alleged problem, reasoning as follows:

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[11] As *Wood* recognized, the judicial factfinding resulting from an incident-denying certification "impos[es] a major restraint upon the plaintiff's right to a jury trial." 995 F.2d at 1130. By contrast, the structure and history of the Westfall Act give us no reason to conclude that Congress intended to "tak[e] from the jury its traditional job of deciding whether an egregious tort (well outside the 'scope of employment'), in fact, occurred." *Id.* at 1126.

> Whether the [defendant] employee was acting within the scope of his federal employment is a significant federal question—and the Westfall Act was designed to assure that this question could be aired in a federal forum. Because a case under the Westfall Act thus "raises [a] question of substantive federal law at the very outset," it "clearly 'arises under' federal law, as that term is used in Art. III."

Id. at 435 (citation omitted) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983)).

Of course, judicial review of the Attorney General's certification cannot raise a "question of substantive federal law" if it raises no question of *law* at all. Yet an incident-denying certification necessarily entails a purely *factbound* determination by the district court. We have already given some examples. *See* Pet. App. 3a (whether Haley influenced LBLA to fire petitioner); *Melo*, 13 F.3d at 747 (whether the defendant supplied a candidate with information about the plaintiffs); *Kimbro*, 30 F.3d at 1502 (whether the defendant assaulted the plaintiff). Other such factbound determinations are easily supplied. *See, e.g., Wood*, 995 F.2d at 1124 (whether defendant "spoke in a sexually suggestive manner to plaintiff" and whether he did "proposition or otherwise make any sexual advances towards plaintiff"); *Heuton v. Anderson*, 75 F.3d 357, 359 (8th Cir. 1996) (whether defendant "posted a picture depicting [one plaintiff] as a momma pig and the other plaintiffs as suckling piglets").

It is difficult to see how any of these factual issues is a "nonfrivolous federal question" or a "question of substantive federal law" as those terms were used by the *Lamagno* plurality. 515 U.S. at 435. Accordingly, an incident-denying certification in a case (like this one) where there is no other basis for federal jurisdiction does indeed raise the Article III problem. *See also id.* at 437 (O'Connor, J., concurring) (finding a "difficult question of federal jurisdiction"); *id.* at 441 (Souter, J., dissenting) (finding a "serious problem" that

"approach[es] the limit [of Article III 'Arising Under' jurisdiction], if it does not cross the line"). Reading the Westfall Act—in accord with the text of § 2679(d), the Act's history and structure, and the jurisprudence of official immunity—*not* to authorize the Attorney General to issue an incident-denying certification avoids this problem.

For these reasons, the Attorney General lacks authority under the Westfall Act to issue an incident-denying certification like the one he issued in this case.

III. Where Removal Is Based upon a Certification Not Authorized by the Westfall Act, the Case Must Be Remanded to State Court.

If the certification issued in this case is not authorized by the Westfall Act, what is the consequence? As explained below, the consequence is straightforward: the case *must* be remanded to state court. This result is compelled by the general remand statute, 28 U.S.C. § 1447(c), and nothing in the Westfall Act itself requires otherwise.

A. Removal Based upon an Unauthorized Certification Is Improper and Obliges a Remand under the Terms of § 1447(c).

1. In *Lamagno*, the Court generally described the removal provision of the Westfall Act: "When the Attorney General has granted certification, if . . . the case was initiated by the tort plaintiff in state court, the Attorney General is to remove it to the federal court, where, as in a case that originated in the federal forum, the United States will be substituted as the party defendant." 515 U.S. at 431-32 (citing § 2679(d)(2)). The specific statutory language providing for removal is as follows:

> Upon certification by the Attorney General *that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose*, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at

> any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending.

§ 2679(d)(2) (emphasis added).

We think it obvious that the emphasized language specifies a particular kind or type of certification upon which removal must be based. That is, the statute does not authorize removal based upon, for example, a certification by the Attorney General *that the defendant employee was acting in good faith*, or a certification by the Attorney General *that the plaintiff's claim is without merit*. Again, only a certification *that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose* will satisfy the statutory prerequisite for removal under the Westfall Act of a state-court civil action against that employee.

As the preceding Part II has demonstrated, however, an incident-denying certification is *anything but* the certification described in § 2679(d)(2). To conclude that the Westfall Act does not authorize the Attorney General to issue an incident-denying certification is necessarily to conclude that such a certification is *not* what the Act comprehends when it refers to (we quote again) a "certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." § 2679(d)(1), (2); *cf.* Part II.A *supra* (p. 22) (showing that "an incident-denying certification is inconsistent with the text of § 2679(d)"). Therefore, a removal based upon an incident-denying certification is a removal that is simply not authorized by the Westfall Act. To say the same thing using terms from this Court's opinions, such a removal is "improper," *IPPL*, 500 U.S. at 77, 78 n.4, 87; "unwarranted," *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 77 (1996); or (echoing § 1447(c)'s use of the word *defect*) "defective," *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 392 (1998).

2. How does a federal court respond to such a removal? To answer that question, we must return to 28 U.S.C. § 1447(c), which encompasses both "removals that are defective because of lack of subject matter jurisdiction and removals that are defective for some other reason." *Wisconsin Department of Corrections*, 524 U.S. at 392. The former category is distinctive in that a jurisdictional defect compels a remand "at any time before final judgment," § 1447(c), but in every case the expected "outcome of an unwarranted removal" is a "swift and nonreviewable remand order" at the start. *Caterpillar Inc.*, 519 U.S. at 77 (citing § 1447(c), (d)). More succinctly: "If removal was improper, the case must be remanded to state court." *IPPL*, 500 U.S. at 78 n.4.

IPPL is illustrative. The principal issue in that case was whether 28 U.S.C. § 1442(a)(1), as it then read, permitted federal *agencies* (like federal officers) to remove cases. *See* 500 U.S. at 79. The Court had "little trouble concluding that the statutory language excludes agencies from the removal power." *Id.*; *but cf.* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206(a), 110 Stat. 3487, 3850 (amending the statute to *in*clude agencies). The Court then confronted the question of remand:

> Having concluded that [the federal agency] lacked authority to remove petitioners' suit to federal court, we must determine whether the case should be remanded to state court. Section 1447(c) of Title 28 provides that, "if at any time before final judgment it appears that the district court lacks subject matter jurisdiction [over a case removed from state court], the case shall be remanded." Since the district court had no original jurisdiction over this case, a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand under the terms of § 1447(c).

500 U.S. at 87 (alteration in original and citation omitted).

Applying these precepts to the present case is straightforward. As previously demonstrated, the Attorney General "lacked authority" to remove petitioner's lawsuit to federal court. Moreover, the district court "had no original jurisdiction over this case" because petitioner has asserted only tort claims under Kentucky law, *see* Pet. App. 24a, and all of the parties are citizens of Kentucky, *see* Pet. App. 25a. Accordingly, the conclusion that "removal was improper deprives [the district] court of subject matter jurisdiction and *obliges a remand under the terms of § 1447(c).*"[12]

It remains to examine whether anything in the Westfall Act overcomes this obligation.

B. Nothing in the Westfall Act Overcomes the Statutory Obligation to Remand.

In the court below, respondents argued that "even if the district court correctly denied the United States' motion to substitute, it erred in remanding the case to state court." Pet. App. 8a. The court of appeals agreed with respondents and "with the majority view that the clear language of the [Westfall] Act forecloses remand," so that "the district court lacked authority to remand the [present] action." Pet. App. 10a. The "clear language" on which the court relied is the final sentence of § 2679(d)(2): "This certification of the Attorney General shall *conclusively* establish scope of office or employment for purposes of removal" (emphasis added). In earlier reaching the same conclusion as the court below, the Third, Fourth, and Fifth Circuits relied on the same statutory provision, particularly the same adverb. *See Aliota*, 984 F.2d at 1356; *Borneman*, 213 F.3d at 825-26; *Garcia v. United States*, 88 F.3d 318, 323-25 (5th Cir. 1996).

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[12] As discussed above (pp. 12-13), the mandated result is the same even if the improper removal falls into the category of "removals that are defective for some other reason" than lack of subject matter jurisdiction. *Wisconsin Department of Corrections*, 524 U.S. at 392. Section 1447(c) "now applies broadly to include all removals that are not authorized by law." *Cook*, 320 F.3d at 434-35.

With respect to certifications that are authorized by the Westfall Act and thus satisfy the statutory prerequisite for removal, this interpretation of § 2679(d)(2)'s final sentence is eminently reasonable. It gives effect to the adverb *conclusively*, and it "foreclose[s] needless shuttling of a case from one court to another." *Lamagno*, 515 U.S. at 433 n.10. As explained below, however, this interpretation is plainly wrong with respect to an incident-denying certification.

1. Consider the text itself. Precisely what is it that "conclusively establish[es] scope of office or employment for purposes of removal"? The subject of the sentence is "This certification of the Attorney General." And "*This* certification," of course, is that oft-quoted certification specified in the *first* sentence of § 2679(d)(2), namely the "certification by the Attorney General that the defendant employee was acting within the scope of his office or employment." Yet as demonstrated repeatedly, and most recently in Part III.A.1 above (p. 35), an incident-denying certification is *anything but* the certification described in § 2679(d)(2). Accordingly, an incident-denying certification cannot establish *anything* for purposes of removal, much less establish it conclusively.

Moreover, an incident-denying certification cannot be said to establish "scope of office or employment." As documented in Part II.B above (pp. 23-26), such a certification actually dispenses with a true scope-of-employment inquiry in favor of an inquiry solely into merits facts. Although the former implicates federal law (and so serves as a basis for removal jurisdiction), the latter does not. For both of these reasons, the final sentence of § 2679(d)(2) does not foreclose remand of a case (like the present one) improperly removed on the basis of an incident-denying certification.[13]

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[13] That the term "conclusively" does not override every other consideration should not be surprising. Would an otherwise proper Westfall Act certification foreclose remand if the Attorney General relied on it to remove a *criminal* case, a case commenced in *tribal* court, or a case in which *trial had already begun*? We think not.

2. Constitutional considerations affirm this conclusion. Although *Lamagno* itself was a case originally filed in federal court under the diversity jurisdiction, a four-Justice plurality (in Part IV of its opinion) nevertheless considered the propriety of "[t]reating the Attorney General's certification as conclusive for purposes of removal." 515 U.S. at 434. The plurality found it "reasonable and proper for the federal forum to proceed beyond the federal question to final judgment once it has invested time and resources on the initial scope-of-employment contest." *Id.* at 436. The four dissenting Justices, on the other hand, found "a serious problem . . . in requiring a federal district court, after rejecting the Attorney General's certification, to retain jurisdiction over a claim that does not implicate federal law in any way." *Id.* at 441 (Souter, J., dissenting). That is, retaining jurisdiction in these circumstances "invite[d] a difficult and wholly unnecessary constitutional adjudication about the limits of Article III jurisdiction." *Id.* at 443-44.

We have previously quoted the plurality's response to the constitutional problem raised by the dissent. *See supra* p. 33. That response makes sense in the context of a certification that properly invokes the Act and properly removes the case to federal court, where a true scope-of-employment question is subject to judicial review and determination. In such a case, it is reasonable to say that while "[t]here may no longer be a federal question once the federal employee is resubstituted as defendant, . . . there *was* a nonfrivolous federal question . . . when the case was removed to federal court." *Lamagno*, 515 U.S. at 435 (plurality opinion). It is also reasonable to say that such a case "raises [a] question of substantive federal law at the very outset," and it therefore "clearly 'arises under' federal law, as that term is used in Art. III." *Id.* (quoting *Verlinden B.V.*, 461 U.S. at 493).

But consider a case where (as here) removal is based upon an incident-denying certification. The only dispute for the district court to resolve is "whether the alleged incident occurred," Pet. App. 11a, which is necessarily a "pure issue

of fact," *Crawford-El*, 523 U.S. at 589; *see also supra* p. 33 (cataloging factbound determinations entailed by incident-denying certifications). Again, it is difficult to see how any of these factual issues is a "nonfrivolous federal question" or a "question of substantive federal law" as those terms were used by the *Lamagno* plurality. 515 U.S. at 435. Accordingly, unless this case and others of its kind are remanded to state court, Westfall Act litigation will "cross the line" of Article III jurisdiction, as the *Lamagno* dissent warned. *Cf. Mesa v. California*, 489 U.S. 121, 137 (1989) ("Adopting the Government's view would eliminate the substantive Art. III foundation of [the statute] and unnecessarily present grave constitutional problems.").

3. Finally, we think the construction of § 2679(d)(2) proffered here is supported by an analogy to the federal officer removal statute, 28 U.S.C. § 1442(a). As the Court reiterated in *Jefferson County v. Acker*, 527 U.S. 423 (1999), in order to qualify for removal under § 1442(a), the federal officer must "raise a colorable federal defense." *Id.* at 431 (citing *Mesa*, 489 U.S. at 139). In enforcing this mandate, the Court does "not require the officer virtually to 'win his case before he can have it removed.'" *Id.* (quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)). For example, in *Jefferson County* itself, the Court opined that the officers' intergovernmental tax immunity "argument, although we ultimately reject it, presents a colorable federal defense," *id.*, and thus the Court held that "the case was *properly* removed under the federal officer removal statute," *id.* at 427 (emphasis added). In *Mesa*, by contrast, the removing defendants "raise[d] no colorable claim of federal immunity or other federal defense," and the Court therefore affirmed a judgment remanding the defendants' cases to state court. 489 U.S. at 124.

The Attorney General's certification under § 2679(d)(2) that the defendant employee was acting within the scope of his employment is fairly analogized to the assertion of a colorable federal defense under § 1442(a). That certification,

like the federal defense, need not be "right"—in the sense of being resolved in the federal defendant's favor on judicial review—to make removal "proper." Indeed, such a certification would be "conclusive[] . . . for purposes of removal," § 2679(d)(2), in the same way that assertion of a colorable federal defense is conclusive for those purposes. *See, e.g., Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981) (noting that removal under § 1442(a) contemplates that all issues, federal and state, will be resolved in the federal forum). On the other hand, just like a federal defense that is not even colorable, a certification that is not authorized by the Westfall Act—to wit, an incident-denying certification—cannot sustain a removal. As in *Mesa*, such an action must be remanded to state court.

For these reasons, a removal based upon an incident-denying certification is improper and obliges a remand to state court under § 1447(c), and nothing in the Westfall Act overcomes that obligation. Therefore, remand of this case is not foreclosed; it is compelled.

CONCLUSION

The judgment of the court of appeals should be vacated for lack of jurisdiction. Alternatively, that judgment should be reversed on the merits. In either event, the judgment of the district court remanding this action to the Trigg County (Kentucky) Circuit Court should be reinstated.

Respectfully submitted.

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APPENDIX

28 U.S.C. § 2679

Sec. 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true

copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be

an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

Supreme Court, U.S.
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(11)

No. 05-593

In the Supreme Court of the United States

PAT OSBORN, PETITIONER

v.

BARRY HALEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT BARRY HALEY

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QUESTIONS PRESENTED

1. Whether the Attorney General's decision under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. 2679(d)(2), to certify that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose" (thus permitting the substitution of the United States for the employee as the defendant and the removal of the case to federal court) must accept the truth of the plaintiff's allegations.

2. Whether the Westfall Act's provision that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal" of the suit from state court, 28 U.S.C. 2679(d)(2), establishes that a district court is to retain jurisdiction over the removed suit, even if the court ultimately overturns the Attorney General's scope-of-employment certification for purposes of substituting the United States as the defendant.

3. Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. 1447(d).

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In the Supreme Court of the United States

No. 05-593

PAT OSBORN, PETITIONER

v.

BARRY HALEY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT BARRY HALEY

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 422 F.3d 359. The opinions of the district court (Pet. App. 19a-25a, 12a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2005. The petition for a writ of certiorari was filed on November 7, 2005. The petition for a writ of certiorari was granted on May 15, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. In 1946, Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, which waives the United States' sovereign immunity and subjects it to liability in federal district court for injuries "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment," if a private person in like circumstances would be lia-

ble under state law. 28 U.S.C. 1346(b)(1). Before the FTCA's enactment, parties injured by a government employee's actions could seek judicial relief only by suing the employee in his individual capacity, which constituted "a very real attack upon the morale" of government employees. *United States* v. *Gilman*, 347 U.S. 507, 512 n.2 (1954) (quoting testimony of Assistant Attorney General Francis M. Shea).

Although the FTCA permits plaintiffs to sue the United States for the torts of its employees, it did not, as originally enacted, foreclose a plaintiff from suing the employee individually. If the employee was sued, he could, however, assert a defense of common law official immunity. See *Barr* v. *Matteo*, 360 U.S. 564 (1959). In addition, in 1948, Congress extended to all federal employees who were sued in state court for "any act under color of [their] office" the right to remove the suit to federal district court. 28 U.S.C. 1442(a)(1). See *Willingham* v. *Morgan*, 395 U.S. 402, 405 (1969) (tracing history of federal officer removal statutes from 1815).

In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the Westfall Act, which confers a statutory immunity on federal employees for acts within the scope of their employment. The Westfall Act was enacted to override the decision in *Westfall* v. *Erwin*, 484 U.S. 292 (1988). In *Westfall*, the Court held that, in order to obtain personal immunity from suit on a tort claim, a federal employee must show both that he was acting within the scope of his employment and that he was performing a discretionary function. *Id.* at 299. The Westfall Act confers absolute immunity on federal employees from all common-law tort claims arising out of acts taken within the scope of their employment, thereby eliminating the discretionary function requirement for immunity under *Westfall*. See *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 425-426 (1995); H.R. Rep. No. 700, 100th Cong., 2d Sess. 4 (1988) (H.R. Rep. 700).

The Westfall Act provides that, for injuries due to "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment," the remedy available against the United States under the FTCA is "exclusive" and bars any damages action against the employee "arising out of or relating to the same subject matter." 28 U.S.C. 2679(b)(1). When a lawsuit is filed against a federal employee, the Westfall Act authorizes the Attorney General to issue a certification that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1). If the Attorney General issues such a certification, the suit "shall be deemed an action against the United States" under the FTCA, and "the United States shall be substituted as the party defendant." *Ibid.*

If the suit against the employee was initiated in state court, the Westfall Act further provides that, upon the Attorney General's certification, the action "shall be removed" by the Attorney General to federal district court, where it "shall be deemed" to be an action against the United States, and the United States "shall be substituted" as the party defendant. 28 U.S.C. 2679(d)(2). The Act also expressly provides that the Attorney's General certification "shall conclusively establish scope of office or employment for purposes of removal." *Ibid.* In *Lamagno*, the Court held that the Attorney General's "scope-of-employment certification is reviewable in court" if the plaintiff challenges it. 515 U.S. at 420.

2. Petitioner was an employee of Land Between the Lakes Association (LBLA), a private organization that had a contract with the United States Forest Service to provide services at the Land Between the Lakes National Recreation Area in Kentucky. Luber Br. in Opp. App. 2 (Luber App.) (complaint). Petitioner applied for a job with the Forest Service, but was not hired. *Id.* at 2-3. During a meeting of employees of the Forest Service, LBLA, and another contractor, respondent Barry Haley—a Forest Service manager—an-

nounced that another person had been hired for the position. *Id.* at 3. At that meeting, in front of the whole gathering, petitioner questioned Haley regarding his failure to inform her before the meeting that she had not been hired and "made a joke at [Haley's] expense." *Ibid.*; Pet. App. 20a. Shortly thereafter, petitioner's supervisor told her that she should apologize to Haley. Pet. App. 20a. Petitioner refused. *Ibid.*

Petitioner later filed a complaint with the Department of Labor (DOL), questioning whether the Forest Service's hiring decision had given appropriate consideration to veterans' preference points to which she was entitled. Pet. App. 20a. The DOL investigator, Robert Kuenzli, contacted Haley and found that the decision was handled properly. *Ibid.* On the same day, the executive director of LBLA summoned petitioner and demanded again that she apologize to Haley for "not being a good Forest Service partner." *Id.* at 21a; Luber App. 4. Petitioner again refused, and she was fired by LBLA two days later. Pet. App. 21a.

3. a. Petitioner filed suit in state court asserting claims (1) against LBLA and its executive director, Gaye Luber, alleging that petitioner had been terminated in violation of public policy in retaliation for inquiring with DOL about the handling of her veterans' preference points, (2) against Haley, alleging interference with petitioner's employment relationship with LBLA, and (3) against all the defendants, alleging conspiracy wrongfully to discharge petitioner and conspiracy to interfere with her employment relationship with LBLA. Pet. App. 21a. The complaint alleged that both Haley and Luber had acted "in a malicious, oppressive, and intentional manner in order to injure and damage plaintiff," Luber App. 9, but asserted that such conduct by Luber "was within the scope of her employment duties with defendant LBLA," *ibid*, whereas Haley was "[a]cting outside the scope of his employment," *id.* at 7.

b. The United States Attorney certified, under 28 U.S.C. 2679(d)(2), that Haley "was acting within the scope of his em-

ployment * * * at the time of the conduct alleged in the Complaint." Luber App. 23. The United States then removed the case to the United States District Court for the Western District of Kentucky pursuant to both the general federal officer removal statute, 28 U.S.C. 1442, and the Westfall Act removal provision, 28 U.S.C. 2679(d)(2). See 03-cv-192, Rec. #1, Notice of Removal 3. In federal court, the government filed a notice of proposed substitution and moved to dismiss the claims against the United States for failure to comply with the FTCA's administrative exhaustion requirement. Pet. App. 19a; Luber App. 23-29.

In her response to the government's motion to dismiss (see J.A. 17-20), petitioner urged the district court to "reverse[]" the Attorney General's certification, to resubstitute Haley as defendant, and to lift a stay of discovery. J.A. 20. Petitioner did not seek a remand. She argued that, as a matter of law, Haley's alleged conduct was outside the scope of his employment because the Forest Service and LBLA had a Memorandum of Understanding (MOU) pursuant to which Forest Service employees were not to participate in hiring or firing decisions by LBLA and because Haley's alleged conduct did not further the interests of the Forest Service, his employer. See J.A. 19, 30. In its reply (see J.A. 35-39), the United States argued that petitioner could not overcome the presumption in favor of the Attorney General's certification simply by relying on an unsupported inference that there was a nexus between the complaint she filed with the DOL and her termination. J.A. 38.

The district court held that there was no need for an evidentiary hearing on the scope-of-employment issue because it did not understand the government to "deny any of the factual allegations contained in [petitioner's] complaint." Pet. App. 22a. Applying state law, which governs scope of employment under the FTCA, *Williams* v. *United States*, 350 U.S. 857 (1955), the court concluded that, in light of the MOU, "any interaction Mr. Haley might have had regarding [petitioner's]

employment was out of the scope of his duties with the Forest Service." Pet. App. 23a. Believing that "it must accept [petitioner's] allegations as true," the court concluded that "Haley's alleged actions occurred outside the scope of his employment," and that therefore the Attorney General's certification had to be overturned. *Id.* at 24a.

In the second part of its order, the district court held that, because of the court's rejection of the United States' substitution, and the absence of diversity jurisdiction, the court lacked jurisdiction over the suit and that the case must be remanded to state court. Pet. App. 24a-25a.

c. The government sought reconsideration. See J.A. 40-50. The motion pointed out that the court had been under the mistaken impression that the United States did not contest the plaintiff's allegations and that therefore no evidentiary hearing was necessary. J.A. 41. The government noted that its Answer had, in fact, contested all of the plaintiff's factual allegations. J.A. 42-43. In addition, the government submitted declarations from both Haley and Luber, the LBLA director. Haley averred that he had not spoken with Luber between the time of the DOL investigation and petitioner's firing and that he did not "attempt to influence [Luber's] independent decision to fire [petitioner]." J.A. 51-52. Luber similarly averred that petitioner's DOL complaint "was not and could not have been a factor in my decision to terminate [petitioner], because I did not know it had occurred." J.A. 53.[1] The government urged that those affidavits were sufficient, in the absence of contradictory evidence from petitioner, to support the Attorney General's scope-of-employment determination. J.A. 45-46. Alternatively, the government argued that, "[a]ssuming, for the sake of argument only, that Haley and Luber interacted regarding plaintiff's employment," dis-

[1] Neither Haley's or Luber's affidavit said whether they had spoken about petitioner's conduct at the staff meeting or her ability to serve as a Forest Service partner.

covery might reveal that any interaction was within the scope of Haley's employment under Kentucky law. J.A. 47.

The district court denied the motion to reconsider. Pet. App. 12a-16a. The court noted a circuit conflict on the question of how courts should deal with a Westfall Act certification that was "based on an argument that no harm-causing incident ever took place." *Id.* at 14a (citing *Wood* v. *United States*, 995 F.2d 1122, 1124 (1st Cir. 1993) (en banc) (Breyer, C.J.) (holding that the certification "cannot deny the occurrence of the basic incident charged"), and *Kimbro* v. *Velten*, 30 F.3d 1501, 1508-1510 (D.C. Cir. 1994) (holding that the district court must resolve the merits of the underlying dispute in such a circumstance), cert. denied, 515 U.S. 1145 (1995)). Purporting to follow the First Circuit's decision in *Wood*, the district court denied the United States' request for an evidentiary hearing on whether Haley sought petitioner's firing in retaliation for her DOL complaint, *id.* at 15a, and also rejected the United States' request for discovery as to whether, in the alternative, there had been some other interaction between Haley and Luber within the scope of Haley's employment that might have influenced Luber's decision to terminate petitioner, *id.* at 14a. The court would not allow the United States to make an argument concerning possible interaction between Haley and Luber that the court viewed as being inconsistent with Haley's sworn declaration. *Ibid.*

4. The court of appeals reversed. Pet. App. 1a-11a. It analyzed the appeal as presenting the question "whether district courts evaluating a scope certification can resolve material disputes about the facts 'upon which the plaintiff would predicate liability,' or whether instead courts must accept the plaintiff's allegations of such 'merits facts.'" *Id.* at 4a (quoting *Melo* v. *Hafer*, 13 F.3d 736, 742-743 (3d Cir. 1994)). The court "join[ed] the majority of the circuits" on that issue and held that "where the Attorney General's certification 'is based on a different understanding of the facts than is reflected in the complaint,' * * * including a denial of the harm-causing

incident, the district court must resolve the factual dispute." *Id.* at 8a (quoting *Melo*, 13 F.3d at 747). The court cited, among other reasons, the need for the employee's immunity to be decided at the outset of the litigation and the difficulty of administering the First Circuit's distinction in *Wood* between denial by the Attorney General of the alleged harm-causing incident (which the First Circuit held is not permitted in a certification) and disputing the plaintiff's characterization of the incident (which the First Circuit allowed). *Id.* at 5a-7a. The court of appeals therefore remanded to the district court for a hearing to "resolve the factual disputes underlying the scope question, including whether the alleged incident occurred." *Id.* at 11a.

The court of appeals also addressed the question whether, if substitution is ultimately not upheld by the district court, the district court must remand the case to state court. The court held that, in light of the Westfall Act's language stating that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal," 28 U.S.C. 2679(d)(2), the "clear language of the Act forecloses remand." Pet. App. 10a.

SUMMARY OF ARGUMENT

1. The court of appeals had jurisdiction to review the order of the district court overturning the substitution of the United States for the defendant employee and remanding the case to state court. As the courts of appeals have uniformly recognized, a district court order rejecting the Attorney General's scope-of-employment certification under the Westfall Act constitutes the denial of the employee's absolute statutory immunity from suit and is immediately appealable under the collateral order doctrine. Even if it were not appealable as of right, the district court's order remanding the case to state court, in the face of Congress's mandate that the Attorney General's scope-of-employment certification is conclusive for purposes of removal, could be reviewed by mandamus.

Section 1447(d) does not bar the court of appeals from exercising its jurisdiction to review either the substitution ruling or the remand order. That section, this Court has made clear, precludes review only of orders entered pursuant to one of the grounds specified in the subsection that precedes it, 28 U.S.C. 1447(c). Section 1447(c) authorizes remand if the district court "lacks subject matter jurisdiction" over a removed case or if there is some other "defect" in removal. This case does not involve any defect in removal, and Section 1447(c)'s reference to remands for lack of subject matter jurisdiction is best read as limited to remand orders entered on the ground that the court lacked jurisdiction *at the outset*. That reading is consistent with the historical evolution of Section 1447(c) and the general rule that the court's subject matter jurisdiction is fixed at the time a suit is filed and subsequent events do not deprive the court of that jurisdiction. Here, it is clear that the district court had subject matter jurisdiction upon removal and at the time of its substitution ruling.

The remand order here does not fall within the scope of Section 1447(c) for the independent reason that the Westfall Act itself precludes such a remand order. Under the Westfall Act, once a case is removed to federal court on the basis of the Attorney General's scope-of-employment certification, that certification is "conclusive[] * * * for purposes of removal." 28 U.S.C. 2679(d)(2). By categorically precluding remand in such circumstances, Congress removed any such remand orders from the scope of Section 1447(c) and (d). Although Congress did not cross-reference Section 1447(c) expressly in Section 2679(d)(2), it specifically mandated that review of the Attorney General's scope-of-employment certification is to take place in *federal* court and left no doubt that the district court is without authority under Section 1447(c) to remand a case removed under Section 2679(d)(2) if the court overturns the Attorney General's certification. The Congress that categorically precluded such remand orders could not have in-

tended that an erroneous remand escape correction by a federal appellate court.

Even if Section 1447(d) did bar review of the order remanding the case to state court, it would not preclude review of the separate order of the district court rejecting the Attorney General's scope-of-employment certification. That order is separate from and logically anterior to the district court's erroneous remand order. Indeed, because Section 2679(d)(2) precludes such remand orders, Congress clearly intended the substitution order to be appealable without regard to any bar imposed by Section 1447(d). Section 1447(d) clearly applies only to "remand[]" orders, and does not encompass an order entered while the district court had jurisdiction and that the court of appeals would have authority to review.

2. On the merits, the court of appeals was correct in holding that the Westfall Act does not require the Attorney General, in making his scope-of-employment certification, to accept the truth of the plaintiff's allegations. The Westfall Act was enacted to confer absolute immunity, enforceable in federal court, to protect employees from common law tort suits arising out of matters within the scope of that employment. Under petitioner's construction, that purpose of the Westfall Act would be frustrated, and the Act would afford less protection than the general federal officer removal statute.

It is well established that, under 28 U.S.C. 1442, a federal officer can remove a tort suit brought against him in state court by showing that he has a colorable claim to official immunity and that there is a causal nexus between the suit and his federal employment. In making out those jurisdictional elements, the defendant employee is free to assert facts that are inconsistent with those alleged by the plaintiff and, if there is a dispute, he is entitled to present evidence and have the validity of his position determined in federal court. Likewise, if the Attorney General declines to certify that an employee was acting within the scope of his employment, the employee may petition the court to resolve the merits of his

claim and to find that he was, in fact, acting within the scope of his employment.

Petitioner argues that the Attorney General, in contrast, must accept the truth of the plaintiff's allegations, and cannot certify that the employee was acting within the scope of his employment based on a determination of fact that is inconsistent with the plaintiff's claim. There is no basis in the statutory text or policy to conclude that the Attorney General is more constrained in his ability to assert immunity on behalf of the employee than the employee is himself.

Petitioner's position would permit a plaintiff to deny unilaterally a defendant his Westfall Act immunity simply by pleading her case in a way that is inconsistent with the defendant's having acted within the scope of his employment, for example, by alleging that the defendant acted maliciously or intentionally. Petitioner attempts to avoid that problem by distinguishing between denying that an alleged incident occurred (which petitioner would forbid) and recharacterizing the incident in a way that falls within the scope of employment (which petitioner would permit). The majority of the courts of appeals that have considered that approach have correctly rejected it as both conceptually and practically flawed.

3. As noted above, Congress was clear in Section 2679(d)(2) that the Attorney General's certification that a defendant employee acted within the scope of his employment is "conclusive[] * * * for purposes of removal." 28 U.S.C. 2679(d)(2). All nine Members of this Court in *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417 (1995), viewed that language as reflecting Congress's intent that, once a case is removed to federal court on the basis of the Attorney General's certification, it is to remain in federal court, even if the certification is later overturned.

It does not violate Article III for the district court to retain jurisdiction over a case like this, even if the Attorney General's certification is overturned on judicial review. Article

III is satisfied here because, as in the case of general federal officer removal under Section 1442, the Attorney General's certification that the defendant was acting within the scope of his authority establishes a colorable federal defense of immunity under the Westfall Act. The presence of that defense, the fact that the Westfall Act calls for judicial review of that Executive Officer's certification, and the fact that, as a consequence of the Attorney General's certification, the United States is made the defendant and federal substantive and procedural law governs amply satisfy Article III's requirement of a federal element to the case. It does not matter that, after exercising its jurisdiction to decide that federal question, the district court holds the federal immunity defense invalid. The court retains the jurisdiction that was present at the outset of the case, and may proceed, as Congress has directed, to adjudicate the remainder of the case.

ARGUMENT

I. THE COURT OF APPEALS HAD JURISDICTION TO REVIEW THE DISTRICT COURT'S ORDER

In its order granting a writ of certiorari, the Court directed the parties to brief the question "[w]hether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. 1447(d)." 126 S. Ct. 2017 (2006). Petitioner did not challenge the court of appeals' jurisdiction, and that court did not address it. As explained below, both the district court's substitution ruling and its remand order were appealable pursuant to 28 U.S.C. 1291 under the collateral order doctrine, and the latter was reviewable as well by way of mandamus. Section 1447(d) did not bar the court of appeals from exercising that jurisdiction.

A. The District Court's Substitution Ruling And Its Remand Order Are Reviewable Under The Collateral Order Doctrine Or By Way Of Mandamus

The courts of appeals have unanimously and correctly held that a district court order overturning the Attorney General's Westfall Act certification and resubstituting the individual employee as the defendant constitutes a denial of absolute immunity and is subject to immediate appeal pursuant to the collateral order doctrine of *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).[2]

It is well established that "the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985). See *Will* v. *Hallock*, 126 S. Ct. 952, 958 (2006); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982). As the Court has explained, and petitioner concedes (Pet. Br. 28-29), the Westfall Act "establishes the absolute immunity for Government employees that the Court declined to recognize under the common law in *Westfall* [v. *Erwin*, 484 U.S. 292 (1988)]." *United States* v. *Smith*, 499 U.S. 160, 163 (1991). See Westfall Act § 2(a), 28 U.S.C. 2671 note (102 Stat. 4563) (statutory findings concerning importance of "immunity" of federal employees from common law torts). "When a policy is embodied in a constitutional or statutory provision entitling a party to immunity

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[2] See *Woodruff* v. *Covington*, 389 F.3d 1117, 1124 (10th Cir. 2004); *Mathis* v. *Henderson*, 243 F.3d 446, 448 (8th Cir. 2001); *Cuoco* v. *Moritsugu*, 222 F.3d 99, 105-106 (2d Cir. 2000); *Borneman* v. *United States*, 213 F.3d 819, 826 (4th Cir. 2000), cert. denied, 531 U.S. 1070 (2001); *Lyons* v. *Brown*, 158 F.3d 605, 607 (1st Cir. 1998); *Taboas* v. *Mlynczak*, 149 F.3d 576, 579 (7th Cir. 1998); *Rodriguez* v. *Sarabyn*, 129 F.3d 760, 764 (5th Cir. 1997); *Coleman* v. *United States*, 91 F.3d 820, 823 (6th Cir. 1996); *Flohr* v. *Mackovjak*, 84 F.3d 386, 390 (11th Cir. 1996); *Kimbro*, 30 F.3d at 1503; *Aliota* v. *Graham*, 984 F.2d 1350, 1354 (3d Cir.) (Alito, J.), cert. denied, 510 U.S. 817 (1993); *Pelletier* v. *Federal Home Loan Bank*, 968 F.2d 865, 873 (9th Cir. 1992).

from suit * * *, there is little room for the judiciary to gainsay its 'importance'" for purposes of the collateral order doctrine. *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994).

The district court's order resubstituting Haley as the defendant is no less "final" for purposes of the right to an immediate appeal simply because the district court thereafter proceeded to remand the case to state court. This Court rejected such an argument in *Quackenbush* v. *Allstate Insurance Co.*, 517 U.S. 706 (1996). In that case, the Court upheld the appealability of an order remanding the case to state court on abstention grounds. *Id.* at 712-714. The Court rejected an argument that remand orders are categorically nonfinal, even when they would otherwise satisfy the requirements of the collateral order doctrine. *Id.* at 714-715. The court noted that it had previously held, in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 11 n.11 (1983), that an abstention order is immediately appealable because it "puts the litigants in this case 'effectively out of court,' and its effect is 'precisely to surrender jurisdiction of a federal suit to a state court.'" *Quackenbush*, 517 U.S. at 714 (quoting *Moses H. Cone*, 460 U.S. at 11 n.11, certain internal quotation marks omitted). A remand order based on abstention grounds, the Court further observed, "is clearly more 'final' than a stay order in this sense." *Ibid.*

The same reasoning applies here. The district court's order rejecting, as a matter of law, the Attorney General's certification and denying Haley absolute immunity under the Westfall Act was made even more obviously "final" by the fact that the district court proceeded to rely on that denial of immunity as the basis to deny Haley the neutral federal forum that Congress mandated. See 28 U.S.C. 2679(d)(2) (upon the Attorney General's certification, a state suit "shall be removed" and the certification treated as "conclusive[] * * * for purposes of removal"). Moreover, in state court, Haley could be denied an important aspect of his claim of absolute immu-

nity—the right to take an immediate appeal if immunity is denied by the trial court. See *Johnson* v. *Fankell*, 520 U.S. 911, 922-923 (1997) (holding that state courts are not obligated to permit an interlocutory appeal of the denial of qualified immunity in a suit under 42 U.S.C. 1983). If no appeal were available in federal court, the district court's remand order would effectively deny Haley that important federal right.[3]

Even if the district court's remand order were not final for purposes of Section 1291, it would be subject to review on a petition for a writ of mandamus. In *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336 (1976), the Court held that "[b]ecause the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by § 1447(d)." *Id.* at 351. So too here. Section 2679(d)(2) makes the Attorney General's certification "conclusive[]" with respect to the district court's removal jurisdiction. The district court had no authority to disregard that statutory command. Thus, as in *Thermtron*, the district court "exceeded his statutorily defined power" in remanding the case, and that error is subject to correction by mandamus. See *Aliota* v. *Graham*, 984 F.2d 1350, 1357 (3d Cir.) (Alito, J.), cert. denied, 510 U.S. 817 (1993); *Borneman* v. *United States*, 213 F.3d 819, 825 (4th Cir. 2000), cert. denied, 531 U.S. 1070 (2001); *Nasuti* v. *Scannell*, 906 F.2d 802, 811 (1st Cir. 1990) ("[T]he district court's remand order was

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[3] Petitioner argues (Pet. Br. 29-31 (citing *Johnson* v. *Jones*, 515 U.S. 304, 314 (1995)) that a district court's order overturning an "incident-denying certification" cannot qualify as an appealable ruling on a question of immunity because it requires a resolution of disputed facts, and only purely legal determinations can satisfy the collateral order doctrine. Even assuming, *arguendo*, that some category of rulings with respect to a claim of Westfall Act immunity would not satisfy the collateral order doctrine, there can be no serious question that the order under review here, which categorically holds that the Attorney General must accept the plaintiff's allegations in making his scope-of-employment determination, resolves a pure question of law respecting the scope of Westfall Act immunity.

a departure so lacking in statutory basis, and so clearly contrary to Congressional policy as expressed in the Westfall Act, as to require our review by mandamus.").

B. 28 U.S.C. 1447(d) Did Not Bar The Court Of Appeals From Reviewing The District Court's Decree

1. Section 1447(d) is not implicated because the district court's remand order was not among those authorized by Section 1447(c)

It is clear from the text of Section 2679(d)(2) that this case was properly removed to district court as soon as the Attorney General issued the Westfall Act certification, and that the district court was properly vested with subject matter jurisdiction from the outset. See 28 U.S.C. 2679(d)(2) (upon certification, "any civil action or proceeding commenced upon such claim in a State court shall be removed"). Indeed, the district court did not question that it had subject matter jurisdiction at the time of removal. After removal, the court overturned the Attorney General's certification and resubstituted respondent Haley as the defendant. Pet. App. 24a. That ruling by the district court, on a substantive question of federal law, was immediately appealable in its own right because it denied Haley absolute immunity. See pp. 13-15, *supra*. Because that ruling was logically separate from and anterior to the erroneous determination to remand that followed, Section 1447(d) posed no obstacle to appellate review of the substitution order. See pp. 25-27, *infra*. Indeed, because the Westfall Act *precludes* the possibility of a valid removal order after a substitution ruling, Congress clearly contemplated that such rulings would be reviewable without regard to Section 1447(d).

Only after making its substitution ruling did the district court go on to remand the case to state court, believing that it was without jurisdiction to adjudicate the remaining issues "[b]ecause the United States is not before the court," Pet. App. at 25a. That remand did not come within either 28 U.S.C. 1447(c) or (d). It did not alter the fact that the court

had subject matter jurisdiction at the time of removal, and it conflicted with 28 U.S.C. 2679(d)(2), which renders the Attorney General's certification "conclusive[] * * * for purposes of removal." Under this Court's decisions, Section 1447(d) poses no bar to appellate review of such a remand order.

a. Section 1447(d) provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. 1447(d). This Court has made clear, however, that Section 1447(d) must be read in *pari materia* with 28 U.S.C. 1447(c). See *Thermtron*, 423 U.S. at 343. "[O]nly remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127 (1995). See *Kircher* v. *Putnam Funds Trust*, 126 S. Ct. 2145, 2153 (2006) (same). Thus, this Court has reviewed a remand order based on a district court's crowded docket, *Thermtron*, 423 U.S. at 340-341, a remand based on abstention, *Quackenbush*, 517 U.S. at 710-712, and the discretionary remand of state law claims after the federal law claims that had supported removal were eliminated from the case, *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 348 (1988). In each of those cases, the case was properly removed to federal district court, the district court was properly vested with jurisdiction from the outset, and the purported ground for the remand was not one authorized or specified in Section 1447(c).[4]

b. One ground for remand provided in Section 1447(c) is lack of subject matter jurisdiction. But that reference has to

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[4] *Cohill* held that "Section[] * * * 1447(c) * * * do[es] not apply to cases over which a federal court has pendent jurisdiction," and that therefore "the remand authority conferred by the removal statute [Section 1447(c)] and the remand authority conferred by the doctrine of pendent jurisdiction overlap not at all." 484 U.S. at 355 n.11. It follows from *Cohill*'s holding that a discretionary remand of pendent claims is not a remand under Section 1447(c) that such a remand is not within Section 1447(d)'s bar to appellate review. See *Kircher*, 126 S. Ct. at 2153. But see *Things Remembered*, 516 U.S. at 130 (Kennedy, J., concurring) (stating that *Cohill* did not decide "whether subsection (d) would bar review" of orders remanding pendent claims as a matter of discretion).

be understood, and has been understood by the courts of appeals, as limited to remand orders for a lack of subject matter jurisdiction at the time of removal.[5] That reading is consistent with the general rule that a court's subject matter jurisdiction is fixed at the time the suit is brought and is not defeated by subsequent acts. See, *e.g.*, *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 541 U.S. 567, 574 (2004); *Freeport-McMoRan, Inc.* v. *KN Energy, Inc.*, 498 U.S. 426 (1991); *St. Paul Mercury Indem. Co.* v. *Red Cab Co.*, 303 U.S. 283, 203 (1938). In *St. Paul Mercury Indemnity*, for example, the Court held that a case that had been properly removed to federal court under diversity jurisdiction could not thereafter be remanded to state court when the plaintiff later reduced the damages claimed to an amount below the jurisdictional minimum. The Court explained that "events occurring subsequent to removal which reduce the amount recoverable * * * do not oust the district court's jurisdiction once it has attached." 303 U.S. at 293, 296. See *Cohill*, 484 U.S. at 356 n.12 (discussing *St. Paul Mercury Indemnity*). More particularly, in the context of suits removed under the federal officer removal statute, 28 U.S.C. 1442, the Court has made clear that the district court's jurisdiction is established by the presence at the threshold of a colorable defense of federal immunity, and the ultimate resolution of that defense is immaterial to the district court's jurisdiction. See pp. 45-48, *infra*.

That reading is also consistent with the historical evolution of the removal statutes. Section 1447 traces its roots to

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[5] See, *e.g.*, *Lethere*r v. *Alger Group, L.L.C.*, 328 F.3d 262, 265 (6th Cir. 2003) ("appellate review of remand orders is prohibited only where the district court remands because it lacks subject matter jurisdiction at the time of removal"); *Poore* v. *American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1290-1291 (11th Cir. 2000); *Transit Cas. Co.* v. *Certain Underwriters at Lloyd's*, 119 F.3d 619, 623 (8th Cir. 1997), cert. denied, 522 U.S. 1075 (1998); *Trans Penn Wax Corp.* v. *McCandless*, 50 F.3d 217, 223 (3d Cir. 1995); *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708-709 (7th Cir. 1992). But see *Linton* v. *Airbus Industrie*, 30 F.3d 592, 599-600 (5th Cir.) ("jurisdictional remands premised on post-removal events are not reviewable"), cert. denied, 513 U.S. 1044 (1994).

the Act of March 3, 1887, ch. 373, 24 Stat. 553. See *Thermtron Prods.*, 423 U.S. at 346-348. When Congress recodified those provisions in 1948 and 1949, it made explicit that a remand was available based only on defects at the time of removal. Section 1447(c) authorized remand "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction." 28 U.S.C. 1447(c) (1982). In 1988, the day after the Westfall Act was passed, Congress amended Section 1447(c) to specify that a remand motion based on defects in removal procedure must be made within 30 days of removal, while continuing to allow for a motion to remand if "before final judgment it appears that the district court lacks subject matter jurisdiction." Pub. L. No. 100-702, § 1016(c)(1), 102 Stat. 4670. That language remains in the current version of Section 1447(c). As a number of courts of appeals have concluded, after reviewing the change in statutory text and the legislative history, "the proper inquiry is still whether the court had jurisdiction at the time of removal." *Poore* v. *American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1290 (11th Cir. 2000). See *Van Meter* v. *State Farm Fire & Cas. Co.*, 1 F.3d 445, 450 n.2 (6th Cir. 1993); *In re Shell Oil Co.*, 966 F.2d 1130, 1133 (7th Cir. 1992). It is evident that Congress did not intend to depart from the well established rule "that jurisdiction present at the time a suit is filed or removed is unaffected by subsequent acts." *Shell Oil*, 966 F.2d at 1133. Rather, Congress's focus in adopting the textual change was on ensuring that plaintiffs raise promptly any objection to removal on purely procedural grounds. See H.R. Rep. No. 889, 100th Cong., 2d Sess. Pt. 1, at 72 (1988).

Applying that principle here, it is clear that the district court's remand order was not based on a lack of subject matter jurisdiction at the time of removal, and so does not come within Section 1447(c) or trigger the bar to appellate review in Section 1447(d). Under the express terms of Section 2679(d)(2), the Attorney General's certification conferred subject matter jurisdiction on the district court at the time of

removal. That is sufficient to render Section 1447(d) inapplicable.

c. Furthermore, the Westfall Act provides a specific basis for treating the district court's remand order here as falling outside Section 1447(c) and (d). Congress has specifically precluded remand orders of the type here. That determination—whether understood as a special rule for the Westfall Act or a manifestation of the principle that the time of removal is the relevant time for testing subject matter jurisdiction—likewise renders Section 1447(d) inapplicable.

It is axiomatic that the Court will interpret statutory provisions in light of related ones, in an effort to harmonize them. For example, as the Court noted in *Kircher*, Section 1447(d)'s prohibition on appellate review does not apply to remand orders as to which Congress has specified a right to appeal. See 126 S. Ct. at 2153 n.8 (citing, as a situation to which Section 1447(d) does not apply, 12 U.S.C. 1441a(*l*)(3)(C), which provides that the Resolution Trust Corporation "may appeal any order of remand," without cross-referencing Section 1447(d)). Here, rather than specifying that a district court's remand of a suit removed by the Attorney General under the Westfall Act is subject to appeal notwithstanding Section 1447(d), Congress made clear that cases removed by the Attorney General under that mandatory provision of the Westfall Act are not subject to remand *at all*. That determination clearly places an erroneous remand order entered in contravention of 28 U.S.C. 2679(d)(2) outside the scope of Section 1447(c) and (d). The Congress that attempted to preclude the possibility of such a remand order altogether could hardly have intended to render such an order, if nonetheless entered, unreviewable by virtue of Section 1447(d).

Then-Judge Alito made this very point in *Aliota*, explaining that the "subsequently enacted [Section 2679(d)(2)] expresses Congress's intent that subject matter jurisdiction is conclusively established upon the Attorney General's certification. Since subject matter jurisdiction has been conclu-

sively established, there is no jurisdictional question to be resolved by the district court." 984 F.2d at 1357. "Because the District Court remanded a properly removed case *on grounds that he had no authority to consider*, he exceeded his statutorily defined powers," including the remand authority of Section 1447(c) and appellate review "was not barred by § 1447(d)." *Ibid.* (quoting *Thermtron*, 423 U.S. at 351) (emphasis in *Aliota*). See also *Cohill*, 484 U.S. at 356 (*Thermtron* "was a response to a clearly impermissible remand").[6]

d. This Court's recent decision in *Kircher* is not to the contrary and indeed reinforces that conclusion. *Kircher* concerned the Securities Litigation Uniform Standards Act of 1998 (SLUSA), Pub. L. No. 105-353, 112 Stat. 3227, which authorizes removal from state court, under 15 U.S.C. 77p(c), of a "covered class action * * * involving a covered security, as set forth in" 15 U.S.C. 77p(b). Because Section 77p(b) in turn flatly bars a class action suit described by that provision, the district court must dismiss such a case upon removal. The district court in *Kircher* ruled that the class action litigation

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[6] In *Kircher*, Justice Scalia expressed the view that the Court cannot "look[] behind the face of an order to determine its *true* basis," 126 S. Ct. at 2158 (Scalia, J., concurring), an issue that the majority determined was unnecessary to resolve in that case, *id.* at 2153 n.9. That issue is likewise not presented here. It is clear on the face of the district court's opinion that the court based its finding that it lacked jurisdiction on the court's determination, earlier in that order, that the Attorney General's certification should be overturned and Haley resubstituted as the defendant. As we explain above, that is not a jurisdictional holding covered by Section 1447(c). In any event, a reviewing court is not bound to accept the district court's characterization of legal issues on which a question of jurisdiction turns. See *United States* v. *Jorn*, 400 U.S. 470, 478 n.7 (1971) (plurality opinion of Harlan, J.) ("the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction"); *United States* v. *Sisson*, 399 U.S. 267, 279 n.7 (1970). The reviewing court must determine its own jurisdiction independently. See *Liberty Mut. Ins. Co.* v. *Wetzel*, 424 U.S. 737, 742 (1976) (court of appeals erred in accepting the district court's "recital" that final judgment had been entered when the record showed the contrary); *Things Remembered*, 516 U.S. at 134 (Ginsburg, J., concurring).

involved in that case was not precluded by Section 77p(b), and remanded the case. 126 S. Ct. at 2151. This Court held that Section 1447(d) barred appeal of the remand order because it was "necessarily based on the trial court's conclusion that jurisdiction under § 77p(c) was wanting." *Id.* at 2153-2154. The Court explained that "[o]nce removal jurisdiction under subsection (c) is understood to be restricted to precluded actions defined by subjection (b), a motion to remand claiming the action is not precluded must be seen as posing a jurisdictional issue." *Id.* at 2155.

Kircher presented the kind of circumstance that falls within Section 1447(c) and (d). The district court made a purely jurisdictional determination concerning jurisdiction *at the time of removal*, and the litigation would continue in state court, where the parties were free to raise any merits arguments, including those the district court had rejected. See 126 S. Ct. at 2156-2157.

Removal under the Westfall Act is fundamentally different in two critical respects. First, unlike SLUSA, which allows a covered case to remain in state court from the outset, see *Kircher*, 126 S. Ct. at 2156, the Westfall Act provides that a case "*shall be removed*" from state court upon the Attorney General's certification. 28 U.S.C. 2679(d)(2) (emphasis added). The Westfall Act thus mandates a federal forum for determination of the critical scope-of-employment question on the merits of the case.

Second, under SLUSA, the district court's removal jurisdiction depends entirely on the defendants having a *successful* defense. *Kircher*, 126 S. Ct. at 2155 ("removal jurisdiction [is] * * * restricted to precluded actions"). By contrast, as petitioner concedes as a general matter (Pet. Br. 37-38), under the Westfall Act the Attorney General's scope-of-employment certification "conclusively" establishes the district court's removal jurisdiction at the outset, even if the district court later overturns the scope-of-employment determination and resubstitutes the employee as defendant. See pp. 41-49, *in-*

fra. Indeed, the Court in *Kircher* specifically contrasted SLUSA to the federal officer removal statute in this respect, noting that a federal officer's federal defense need only be "colorable" in order to sustain removal jurisdiction under Section 1442(a), because that section "reflects a congressional policy that 'federal officers, indeed the Federal Government itself, require the protection of a federal forum.'" 126 S. Ct. at 2155 n.12 (quoting *Willingham*, 395 U.S. at 407). The Westfall Act reflects that same policy.

Given the express statutory mandate for both initial and continuing jurisdiction in federal district court, it follows from the statutory framework that review lies in a federal court of appeals if the district court disregards that mandate.

e. That conclusion is further reinforced by the consequences of the certification question that Congress has required to be decided by the federal courts under 28 U.S.C. 2679(d)(2). Congress made clear in statutory findings set forth in the Westfall Act itself the purpose to establish an "*immunity* of Federal employees from common law tort liability." Westfall Act § 2(a)(5), 28 U.S.C. 2671 note (102 Stat. 4563) (emphasis added). See *Smith*, 499 U.S. at 163. By the time the Westfall Act was passed, this Court had already established that the denial of claims of absolute or qualified official immunity are subject to immediate appeal. *Mitchell*, 472 U.S. at 525. The same is not true, as a matter of federal law, in state court. By mandating a federal forum to litigate the question of the employee's statutory immunity, Congress can reasonably be understood to have preserved the right to immediate appeal to a federal court of appeals that is triggered in a federal forum if a claim of immunity is rejected. If a district court order overturning a certification and remanding to state court were unreviewable, federal employees would be denied that right.

The district court's resubstitution order also has other ramifications for the litigation far beyond merely deciding whether a state court will hear the merits of the plaintiff's

claims—which was the only consequence in *Kircher*. If the Attorney General's scope certification is correct, the FTCA mandates exclusive jurisdiction over the plaintiff's claims in federal court, see 28 U.S.C. 1346(b)(1), and those claims lie against a different defendant—the United States. See 28 U.S.C. 2679(b)(1) (FTCA remedy against the United States is exclusive). As a result, distinct substantive and procedural rules apply, such as an administrative exhaustion requirement, 28 U.S.C. 2675(a), limitations on liability, 28 U.S.C. 2674, and unique federal defenses, 28 U.S.C. 2680.

In light of the numerous jurisdictional and substantive consequences that flow from resolution of the certification issue under the Westfall Act, petitioner's position that the district court's remand order is unreviewable is especially problematic. The United States would be forced to subject itself and its employees to the jurisdiction of the state courts and seek to vindicate the Attorney General's certification there (assuming that the state courts would have authority to reconsider the district court's ruling), with ultimate review in this Court from an adverse state-court decision. If the position of the United States and its employee on the scope-of-employment issue ultimately prevailed, any proceedings in state court against the employee personally would be a nullity, and the entire litigation would have to begin anew against the United States in federal court pursuant to the FTCA. And, in the meantime, the employee would have been improperly subjected to suit when Congress had mandated immunity. Such exposure to suit and waste of resources would be directly contrary to the Westfall Act's goal of shielding federal employees from the "prospect of personal liability and the threat of protracted personal tort litigation" related to their employment, Westfall Act § 2(a)(5), 28 U.S.C. 2671 note (102 Stat. 4563), and to the very policies of affording a federal forum while promoting judicial efficiency that underlie the Westfall Act and removal statutes generally.

2. *The district court's ruling overturning the Attorney General's certification and ordering Haley resubstituted as the defendant is appealable in its own right*

Even if the remand aspect of the district court's decree were not appealable, the resubstitution order still would be. As explained above, the substitution ruling is clearly appealable under the collateral order doctrine. That ruling does not become unreviewable by operation of Section 1447(d) simply because it is accompanied by an erroneous remand order, and the substitution order is logically separate from and anterior to the remand order. The remand order is not the necessary consequence of the substitution order. Indeed, 28 U.S.C. 2679(d)(2) makes clear that the remand order should not have followed the substitution order at all. Congress's scheme clearly provided for a substitution ruling that would be immediately appealable (because it denies absolute immunity), and that immediate appeal could not be defeated by Section 1447(d) because 28 U.S.C. 2679(d)(2) precluded a remand order. In the event of an erroneous remand order in contravention of 28 U.S.C. 2679(d)(2), whatever can be said about the appealability of the remand order itself, it should not operate to render the substitution order unappealable.

This Court confronted a similar situation in *Waco* v. *United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). There, the Court held that Section 1447(d) does not bar appeal from an otherwise appealable order that is encompassed within a decree that also contains an order remanding the case to state court. In *Waco*, the district court had "entered a single decree embodying three separate orders." *Id.* at 142. One dismissed the cross-complaint against the only diverse party, and another ordered the case remanded to state court because, "upon that dismissal, there was no diversity of citizenship" and the district court thus "lacked jurisdiction." *Ibid.* This Court held that the order dismissing the cross-complaint could be appealed, even though no appeal had been

taken from the remand order and (the Court stated) "no appeal lies" from that order. *Id.* at 143. The Court explained that "if not reversed or set aside, [the dismissal would be] conclusive upon the petitioner" because "the cross-action will be no part of the case which is remanded to the state court." *Ibid.* If the dismissal order was erroneous, reversal would "remit the entire controversy, with the [respondent] still a party, to the state court for such further proceedings as may be in accordance with law." *Id.* at 143-144.

As in *Waco*, the district court's order of March 10, 2002, had three parts. First, the district court "DENIED" the United States' motion to dismiss the complaint. Pet. App. 17a. Next, the court "OVERRULED" the United States' substitution and reinstated Haley as the defendant in his individual capacity. *Ibid.* Finally, the court "REMANDED" the case to state court. *Ibid.* Thus, here, as in *Waco*, the district court's resubstitution order "preceded that of remand." 293 U.S. at 143. That is true not only in a literal sense that the resubstitution order is listed before the remand order in the district court's decree, see Pet. App. 17a, but also as a matter of substance. The district court's March 10 Memorandum and Order resolved the two issues separately. First, it took up the question of the Attorney General's certification and the United States' substitution. *Id.* at 21a-24a. Only *after* concluding that the certification should be overturned did the court take up the separate question of whether, in light of the resubstitution, the case should be remanded. *Id.* at 24a-25a.

Petitioner errs in contending that *Waco* is distinguishable because "as in *Kircher*, the 'remand order here cannot be disaggregated as the *Waco* orders could.'" Pet. Br. 17 (quoting *Kircher*, 126 S. Ct. at 2156 n.13).[7] As noted above, in

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[7] In *Kircher*, the court raised a question as to "the continued vitality of [*Waco*] in light of § 1447(d)." 126 S. Ct. at 2156 n.13. It is unclear in what way the Court thought the enactment of Section 1447(d) might have undermined *Waco*. When Congress enacted 28 U.S.C. 1447(d) in 1949, to cure an oversight in the codification of Title 28 the year before, the House Report that accompa-

Kircher, the question of removal jurisdiction and the question whether the claims were precluded were one and the same. 126 S. Ct. at 2155 ("removal jurisdiction under subsection (c) is * * * restricted to precluded actions defined by subsection (b)"). The district court could not resolve the issue of preclusion without also deciding the issue of its removal jurisdiction. *Ibid.* That is not so here. As this Court made clear in *Lamagno*, when the Attorney General certifies that a federal employee was acting within the scope of employment, the case is properly removed to the federal district court, which then has jurisdiction to decide the federal question whether the Attorney General's scope certification was correct. 515 U.S. at 431-432. There was no suggestion in *Lamagno* that a decision to overturn the certification would render the removal itself improper. There can be little doubt, for example, that, unlike in *Kircher*, the district court in this case could have decided the scope certification question and then asked for briefing on the question of remand. (In fact, petitioner had not requested, and neither party had briefed, the issue of remand.) Had it done so, the government could have immediately appealed the order denying substitution (and thereby denying Haley his statutory immunity) under the collateral order doctrine, as discussed above. The fact that the district court inserted its order remanding the case in the same decree that contained its order on substitution did not shield the substitution order from appellate review.[8]

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nied the amendment explained that it was made "to remove any doubt that *the former law as to the finality of an order of remand to a State court is continued.*" H.R. Rep. No. 352, 81st Cong., 1st Sess. 15 (1949) (emphasis added). Thus, whatever the effect of the enactment of Section 1447(d) in its current form, it did not overturn *Waco* by rendering unappealable an order that otherwise satisfies the requirements of finality under Section 1291 and is itself separable from the remand order, especially when the issue is one that must be decided by the federal district court.

[8] Petitioner appears to concede (Pet. Br. 17-18) that district court orders overturning scope certifications would be separate orders under *Waco* in most cases, but asks the Court to adopt a different rule for this case because,

II. UNDER THE WESTFALL ACT, THE ATTORNEY GENERAL NEED NOT ACCEPT THE TRUTH OF THE PLAINTIFF'S ALLEGATIONS IN MAKING A SCOPE-OF-EMPLOYMENT CERTIFICATION

As previously discussed, see p. 2, *supra*, the Westfall Act built upon and expanded the common law official immunity afforded federal employees for acts taken in connection with their employment. Whereas this Court held in *Westfall* that a government employee enjoys official immunity from tort liability if he was acting within the scope of his employment and performing a discretionary function, 484 U.S. at 299, the Westfall Act eliminates the discretionary function requirement, thereby making the scope-of-employment issue dispositive. See *Lamagno*, 515 U.S. at 425-426; H.R. Rep. 700, at 4. Even before the Westfall Act, it was well established that federal officers are entitled, under 28 U.S.C. 1442(a), to remove state tort suits in order to have their federal immunity defense, including the scope-of-employment issue, determined by a federal court, even though its resolution may turn on disputed facts. It follows *a fortiori* that the Attorney General's scope-of-employment certification under the Westfall Act may likewise rest upon the resolution of disputed facts, subject to review by the federal court following removal.

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petitioner maintains, "the district court in the end did not reject the Attorney General's certification because the court thought it 'erroneous' (in the sense that respondent Haley had acted *outside* rather than *within* the scope of his employment)," but because the court concluded "that the Attorney General lacked authority to issue an incident-denying certification." That assertion does not withstand scrutiny. The district court overruled the Attorney General's scope certification because the court found that, accepting all of petitioner's allegations as true, her tort claims against Haley "fall outside the scope of his employment." Pet. App. 24a. The district court's subsequent order denying the government's motion to reconsider did not undo the court's earlier order. It merely added a further legal ruling that the government was not entitled either to test the truthfulness of the petitioner's allegations or to discover what facts relevant to Haley's scope of employment petitioner might rely on in proving her tort claims. *Id.* at 14a-15a.

A. A Federal Employee Is Entitled To A Federal Forum To Determine His Claim Of Official Immunity, Including To Resolve Any Disputed Facts

Section 1442(a)(1) allows any officer of the United States to remove any civil action where the officer is "sued in an official or individual capacity for any act under color of such office," 28 U.S.C. 1442(a)(1), whether or not the suit could originally have been brought in federal court. See *Willingham*, 395 U.S. at 406. The Court made clear in *Willingham* that a removing federal officer is free to deny the allegations against him and, if there are factual disputes relating to whether the defendant was acting within the scope of his employment, the officer is entitled to a hearing in federal court to resolve those disputed facts. *Id.* at 406-409.

Willingham involved a civil suit filed by a federal inmate in state court against two federal prison officials who were alleged to have tortured the inmate "out of malice." *Morgan* v. *Willingham*, 383 F.2d 139, 140 (10th Cir. 1967). Upon removal pursuant to Section 1442(a)(1), the district court held that the federal officers were entitled to immunity, *ibid.*, but the Tenth Circuit reversed. The court of appeals held that a district court's removal jurisdiction under Section 1442(a)(1) was narrower than the scope of common law immunity, *id.* at 142, and that, in order to remove, a defendant "must exclude the possibility that the suit is based on acts or conduct not justified by his federal duty," *id.* at 141.

This Court rejected that view. It held that Section 1442, at the very least, "is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Willingham*, 395 U.S. at 406-407. The Court explained that one of the purposes of Section 1442 was "to have such defenses litigated in the federal courts," and that the position of the court of appeals would create the "anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit

would be removed only to be dismissed." *Id.* at 407. Such a rule, the Court explained, would be contrary to the statutory purpose of having "the validity of the defense of official immunity tried in a federal court." *Ibid.* "In cases like this one," the Court stressed, "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum." *Ibid.*

Noting that the defendants in *Willingham* had denied the plaintiff's allegations, the Court explained that a federal officer "need not admit that he actually committed the charged offenses," *i.e.*, that the petitioners "actually injured respondent." 395 U.S. at 408. Rather, it was "sufficient" for the federal officers "to have shown that their relationship to respondent derived solely from their official duties." *Id.* at 409. The Court also observed that the plaintiff had alleged that the officials were engaged "on a frolic of their own which had no relevancy to their official duties." *Id.* at 407. With respect to that allegation, the Court held that the officers "should have the opportunity to *present their version of the facts* to a federal, not a state, court." *Id.* at 409 (emphasis added).

The Court has reaffirmed *Willingham* in *Jefferson County* v. *Acker*, 527 U.S. 423 (1999), and *Mesa* v. *California*, 489 U.S. 121 (1989). In *Jefferson County*, the Court held that removal under Section 1442(a)(1) requires a federal officer to "both raise a colorable federal defense," such as official immunity, and show a "'causal connection' between the charged conduct and asserted official authority." 527 U.S. at 431 (quoting *Willingham*, 395 U.S. at 409). In so holding, the Court once again stressed that the claim of immunity need only be "colorable" and that Section 1442(a)(1) "do[es] not require the officer virtually to 'win his case before he can have it removed.'" *Ibid.* (quoting *Willingham*, 395 U.S. at 407). Likewise, the law does not "demand[] an airtight case on the merits in order to show the required causal connection." *Id.* at 432. Recognizing that the parties disagreed as to the nature of the plaintiff's claims, the Court "credit[ed] the [*defen-*

dants'] theory of the case for purposes of both elements of our jurisdictional inquiry." *Ibid.* *Mesa* similarly emphasized that the "validity" of the immunity defense "has no connection whatever with the question of jurisdiction." 489 U.S. at 129 (quoting *Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247, 254 (1868)). It is, rather, the assertion of such a defense that "*is decisive upon the subject of jurisdiction.*" *Ibid.* (quoting *Cooper*, 73 U.S. (6 Wall.) at 252).

Under *Willingham*, *Mesa*, and *Jefferson County*, it is evident that Haley raised a colorable federal defense of official immunity and is entitled, under Section 1442 (wholly apart from Section 2679(d)(2)), to a resolution by the district court of any disputed facts relating to his immunity defense.[9] The complaint makes clear that Haley's "relationship to [petitioner] derived solely from [his] official duties." *Willingham*, 395 U.S. at 409. It alleges that "[a]t all times relevant to this complaint, defendant Barry Haley was employed as Business Manager by USDA Forest Service." Luber App. 2. The only direct contact between Haley and petitioner that is alleged is the staff meeting at which Haley announced that someone other than petitioner had been hired to fill the Forest Service position for which she had applied. The only other actions alleged of Haley, stripped of petitioner's self-serving characterizations, were to respond to an inquiry from the Department of Labor as to the process by which the Forest Service position had been filled, and to raise an objection regarding petitioner with her employer, an independent contractor with the Forest Service. As in *Willingham*, "it was sufficient" to

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[9] The Notice of Removal invoked 28 U.S.C. 1442 in addition to Section 2679. See 03-cv-192 (W.D. Ky.), Rec. #1, Notice of Removal 3. Although, as discussed in the text, petitioner's claims were subject to removal on the basis of Section 1442 alone, the government and Haley did not urge Section 1442 in the court of appeals as a separate ground for reversing the district court. As we explain below, see pp. 32-39 *infra*, the Attorney General's removal authority under Section 2679(d)(2) is certainly no more limited than removal jurisdiction under Section 1442.

satisfy the causal nexus test "for [Haley] to have shown that [his] relationship to [petitioner] derived solely from [his] official duties." 395 U.S. at 409.

With respect to the merits of Haley's immunity defense, he was no more required to accept the truth of petitioner's allegation that he "maliciously induced" her dismissal from LBLA "in retaliation for plaintiff filing a veterans' preference inquiry," Luber App. 7, than the defendants in *Willingham* were required to accept the plaintiff's allegation that they were on a "frolic of their own" and had tortured plaintiff "out of malice." 395 U.S. at 407; 383 F.2d at 140. As in *Willingham*, Haley was entitled "to present [his] version of the facts to a federal, not a state, court" to determine "the validity of [his] defense[]" of immunity. 395 U.S. at 409.

B. The Attorney General Is No More Constrained To Accept The Plaintiff's Version Of The Facts In Making A Scope-Of-Employment Certification Under The Westfall Act Than The Federal Officer And The Federal District Court Are Under Section 1442

The district court held in this case that, "[a]t [the removal] stage, this Court must accept [petitioner's] allegations as true," and that it was therefore sufficient to defeat removal under the Westfall Act that petitioner had "adequately alleged conduct on Mr. Haley's part that, if proven, would give rise to tort claims under Kentucky state law and that fall outside the scope of his employment with the United States Forest Service." Pet. App. 24a. That reasoning is the same as the rejected analysis of the Tenth Circuit in *Willingham*: that in order to remove under Section 1442(a)(1), a defendant "must exclude the possibility that the suit is based on acts or conduct not justified by his federal duty," 383 F.2d at 141.

There is no basis for construing the Attorney General's authority to remove an action under 28 U.S.C. 2679(d)(2) as any narrower than a federal officer's ability to remove a case under Section 1442(a). Indeed, petitioner recognizes that the

two statutes are "fairly analogized." Pet. Br. 40. Nonetheless, without discussing *Willingham* (see *id.* at 27-28 (discussing pre-Westfall Act immunity cases, without reference to *Willingham*)), petitioner contends that the Attorney General cannot certify that a federal employee was acting within the scope of employment if "the resulting adjudication by the district court would necessarily consist of 'deciding whether the employee committed the wrong the plaintiff alleges.'" *Id.* at 19 (quoting Pet. App. 5a). As discussed above, that contention cannot be squared with this Court's construction of Section 1442(a) in *Willingham*, and nothing in Section 2679(d) suggests a different result here. Neither the Attorney General, nor the District Court post-certification, needs to credit the plaintiff's version of events.

1. Petitioner notes that Section 2679(d) allows the Attorney General to certify that the defendant was "acting within the scope of his office or employment at the time of the incident out of which the claim arose." Pet. Br. 22 (quoting *Wood*, 995 F.2d at 1124 (Breyer, C.J.) (quoting 28 U.S.C. 2679(d)(1)). Contary to the reasoning in *Wood*, nothing in that language requires the Attorney General to accept the truth of the plaintiff's allegations regarding the "incident" that gave rise to her claim or the federal official's connection with it.

As the several courts of appeals that have rejected the rule of *Wood* have noted, placing critical weight on the "time of the incident" language, as the *Wood* court's analysis does, would create an anomaly when the language of Section 2679(d)(1) and (2) is compared with that of Section 2679(d)(3), which the *Wood* majority did not discuss. See *Melo*, 13 F.3d at 746-747; *Kimbro*, 30 F.3d at 1508; *Heuton* v. *Anderson*, 75 F.3d 357, 360 (8th Cir. 1996); Pet. App. 6a-7a. Section 2679(d)(3), which authorizes a district court to make a scope-of-employment determination at the request of the defendant employee (when the Attorney General has refused to certify that the defendant was acting within the scope of employment), does not have the "time of the incident" language re-

lied upon by *Wood* with respect to Section 2679(d)(1). Section 2679(d)(3) states, without limitation, that the employee may "petition the court to *find and certify* that the employee *was acting within the scope of his office or employment.*" 28 U.S.C. 2679(d)(3) (emphasis added). Section 2679(d)(3) provides no basis for having the district court evaluate the scope-of-employment question based only on the allegations of the plaintiff. There is no basis for concluding that Congress intended the Attorney General to be more circumscribed by the plaintiff's allegations in making a certification under Section 2679(d)(1) and (2) that the employee was acting within the scope of employment than the district court is when reviewing the Attorney General's denial of such a certification.

The "time of the incident" language in Section 2679(d)(1) and (2) necessarily refers to the "incident" described in the plaintiff's claim. Nothing in that reference lays down a requirement that the plaintiff's allegation be accepted as true, especially against the contrary background rule of *Willingham* and similar cases. The reference most naturally is read to make clear that the scope of employment is to be considered in conjunction with the claims at issue, not in the abstract. At most, the "time of the incident" language serves a function similar to that of the nexus test under Section 1442, which permits removal only of a claim "for any act under color of such office." 28 U.S.C. 1442(a)(1). The Court has construed that language to require simply a "causal connection" between the claim and the officer's employment, *Jefferson County*, 527 U.S. at 431 (quoting *Willingham*, 395 U.S. at 409).

The Court need not decide in this case what the minimal requirements would be under the "at the time of the incident" language in Section 2679(d)(1) and (2) for the relationship between the claim and the defendant's employment. It is enough for present purposes for the Court to conclude that Section 2679(d)(1) and (2) would impose no *greater* a nexus requirement than Section 1442. Because "it was sufficient" to

satisfy the causal nexus test of Section 1442(a)(1) "for [Haley] to have shown that [his] relationship to [petitioner] derived solely from [his] official duties," *Willingham*, 395 U.S. at 409, see pp. 29-32, *supra*, it was equally sufficient to satisfy any nexus requirement under Section 2679(d)(2).

2. Petitioner also urges (Pet. Br. 23-27) that allowing the Attorney General to certify under the Westfall Act based on a determination that the employee did not act as the plaintiff alleges would be inconsistent with the broader framework of the Westfall Act and the FTCA because it impermissibly "conflate[s]" the "fundamentally different" inquiries regarding scope of employment and the underlying merits. Pet. Br. 24. But the overlap between those inquiries is, in some cases, unavoidable, and it is no more problematic in the Westfall Act context than in the context of other forms of official immunity, which can serve as the basis for removal under Section 1442(a). In *Anderson* v. *Creighton*, 483 U.S. 635 (1987), for example, the Court explained that the court should first try to resolve the defendant's claim of immunity on the purely legal question whether the law was clearly established. *Id.* at 646 n.6. If it could not be resolved on that basis, then, "if the actions Anderson claims he took are different from those the Creightons allege (and are actions that a reasonable officer could have believed lawful), * * * *discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved.*" *Id.* at 646-647 n.6 (emphasis added).

Similarly, under the Westfall Act, the question whether the employee was acting within the scope of his employment can usually be made as a matter of law, but will occasionally require limited discovery and the determination of facts. Under Kentucky law, as understood by the district court, the scope-of-employment determination turns on four factors: whether the "conduct [was] similar to [the employee's] ordinary course of duties," whether the employee's actions "occur[red] within the 'spacial and temporal limits' of his

work," whether the actions were "taken to further the [employer's] goals," and whether the conduct was foreseeable. Pet. App. 23a. Any one of those factors, in a particular case, could turn on disputed facts that also relate to the merits of the plaintiff's claim. Evidence regarding the third—whether the acts were taken to further the employer's goals—is especially likely to overlap with the merits when, as here, the plaintiff's claim depends on showing a particular intent. There is nothing problematic about the court's resolving those overlapping issues as part of its review of the Attorney General's scope-of-employment certification. Indeed, in *Lamagno*, the plurality opinion recognized that, in the course of its review, "the court inevitably will confront facts relevant to the alleged misconduct." 515 U.S. at 435 (opinion of Ginsburg, J.). See also *id.* at 443 (Souter, J., dissenting) (noting the "overlap of jurisdictional evidence and liability evidence"). A plaintiff cannot, simply by asserting a fact or mental state that would be inconsistent with the defendant's scope of employment, preclude the Attorney General from concluding that the defendant was acting within the scope of employment.

The First Circuit's decision in *Nasuti*, is instructive. In that case, the plaintiff alleged that a National Park Service employee had committed an intentional battery by driving his government car in a fashion that hurt the plaintiff. The magistrate judge recognized that "if the plaintiff's version of the events * * * were believed, there was sufficient evidence for a jury to find that the [defendant] had acted intentionally * * * in a manner which amounted to the commission of an assault and battery," and that "these intentional acts would necessarily fall outside the scope of [the defendant's] employment." 906 F.2d at 805. The magistrate believed, along the lines advocated by petitioner, that because he could not decide the scope-of-employment question "without also deciding the merits of [the plaintiff's] case, *i.e.*, whether [the defendant] had committed an assault and battery," the case was not properly removed to federal court. *Ibid.* The First Circuit re-

jected that analysis, holding that the district court "should have decided the scope question," *id.* at 814, including whether, contrary to the plaintiff's allegations, the defendant "was blameless or merely negligent, and was acting within the scope of his authority," *id.* at 812.

As in *Nasuti*, there are (at least) three possible scenarios regarding what took place in connection with petitioner's termination from LBLA: (1) Haley was "blameless," *i.e.*, his interactions with petitioner and LBLA in the context of his employment at the Forest Service had nothing to do with petitioner being fired; (2) Haley did have some connection to petitioner's dismissal, but his actions were intended to further the interests of the Forest Service, such as objecting to petitioner's conduct at the joint staff meeting and raising questions about whether she was a good person for the LBLA-Forest Service team, and were therefore within the scope of his employment; or (3) Haley did, as alleged by plaintiff, bring about petitioner's firing through actions that were outside the scope of his employment. Like the magistrate judge in *Nasuti*, the district court here believed that, at the removal stage, the Attorney General "must accept [petitioner's] allegations as true." Pet. App. 24a. The court would not allow the Attorney General to assert, in the alternative, that Haley had not brought about petitioner's dismissal, but that, if he had some role, that role was within the scope of his employment. *Id.* at 13a-14a. But *Willingham* allows a removing official to do just that under Section 1442(a). 395 U.S. at 408-409. That kind of pleading in the alternative is no more unworkable in the Westfall Act context than it is in the context of Section 1442.

3. Petitioner relies heavily (Pet. Br. 3, 18, 23, 25 n.7) on the supposed "concession" in the court of appeals that, "if Haley induced [petitioner's] firing, he acted outside the scope of his employment." Pet. App. 3a. As we noted in our brief at the petition stage (at 14 n.5), the statement in Haley's appellate brief on which petitioner relies—that "the Memorandum

of Understanding only showed that, if Haley did cause the Contractor to fire [petitioner], he acted outside the scope of his employment," Haley C.A. Br. 21—was intended, in context, only to acknowledge that it would have been outside the scope of Haley's employment for him to orchestrate petitioner's firing with the sole intent of retaliating against her for having filed a DOL inquiry, as the complaint alleges. To the extent petitioner reads that statement as conceding that it would necessarily have been outside the scope of Haley's employment for him to influence petitioner's termination in any way, petitioner is also mistaken as a legal matter.[10] In any event, it is clear that the statement in an appellate brief could have had no influence on the district court's assessment of the Attorney General's certification. In the district court, the government specifically disputed that it would necessarily have been outside the scope of Haley's employment for him to influence petitioner's firing by, for example, raising concerns about her ability to be a good partner to the Forest Service. J.A. 47.[11]

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[10] Even assuming (which the United States and Haley dispute) that Haley would have violated the Memorandum of Understanding by raising a concern about petitioner's fitness for the LBLA-Forest Service team, it is beyond question that an employee can violate the law (or, in this case, a contract) while still acting within the scope of his employment. See, *e.g.*, *Patterson* v. *Blair*, 172 S.W.3d 361, 372 (Ky. 2005) (upholding jury verdict of vicarious liability of employer because, "although the act [of shooting out a truck's tires] was criminal, it was not so outrageous to indicate that the motive was a personal one"); *Heuton*, 75 F.3d at 361 ("It is true that * * * posting the picture was unquestionably prohibited by the USDA, but that does not mean that the act was necessarily outside of the scope of Anderson's employment.").

[11] This alternative set of facts would not, contrary to the district court's understanding, necessarily contradict the assertions in Haley's affidavit. Haley stated that he "had no communication with Ms. Luber *regarding the Department of Labor inquiry to my office*," that he "had no advance knowledge of the termination of [petitioner's] employment with LBLA," and that he "did not advise Gaye Luber regarding the matter, nor * * * attempt to influence her independent decision to fire [petitioner]." J.A. 51-52 (emphasis added). It would be consistent with those statements for Haley to have complained to

Even if petitioner's characterization of the supposed concession were accurate and the Court were inclined to rely on it, Haley would still be entitled under *Willingham* to "present [his] version of the facts to a federal, not a state, court." 395 U.S. at 409. The Court in *Willingham* did not determine that (indeed, it did not even ask whether) it would have been within the scope of employment if, as alleged, the defendant prison officials had tortured the prisoner plaintiff out of malice. Rather, the Court allowed the removing defendants to deny "that they actually injured respondent," *id.* at 408, while maintaining at the same time that any interaction they in fact had with the plaintiff, was "in the performance of [the defendant's] official duties," *ibid.*, and insisting that any factual dispute with respect to the plaintiff's allegation that "they were engaged in some kind of 'frolic of their own'" be resolved by "a federal, not a state, court," *id.* at 409. Haley was similarly entitled to a federal forum to determine the facts relating to his defense of federal officer immunity.

C. Petitioner's Construction Of Section 2679(d)(1) Would Allow Plaintiffs To Deny Federal Employees The Benefits Of The Westfall Act Through Artful Pleading

The First Circuit decision in *Wood*, upon which petitioner relies heavily, acknowledged that its approach carried a risk that "through artful pleading," a plaintiff could "transform a job-related tort into a non-job-related tort" by alleging in her complaint that the defendant employee "acted with a state of mind that, under traditional *respondeat superior* doctrine, would place the action outside the 'scope of employment,' say, an 'intentional' or 'deliberate' state of mind," or by alleging facts "indicating that, at the time, the employee was on a 'frolic of his own.'" 995 F.2d at 1129. To address that criticism, the court emphasized that "the Attorney General's certificate may contest a plaintiff's incident-describing and inci-

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Luber about petitioner's unacceptable behavior at the all-staff meeting, but without discussing whether petitioner should be fired.

dent-characterizing facts," such as whether the defendant had acted "intentionally," and that the district court "may resolve any such factual conflicts, relevant to immunity, prior to trial." *Ibid.* The court recognized the potential difficulties in drawing the line "between denying facts that amount to a 'characterization' or 'description' and denying that any harm-causing incident occurred at all," but left it to later cases to resolve that "administrative problem." *Ibid.*

Decisions by other courts of appeals have emphasized the practical, as well as theoretical, difficulty in drawing the kind of distinctions "between *characterization* of an incident and *denial* of an incident" that the *Wood* majority envisioned. Pet. App. 6a; *Kimbro*, 30 F.3d at 1507; *Melo*, 13 F.3d at 743, 746. That difficulty is fully evident on the facts of this case.

The Attorney General's certification did not depend on denying many of the allegations of petitioner's complaint: that she applied for a position with the Forest Service, but was not hired; that Haley was the official responsible for that hiring determination; that petitioner and Haley had an exchange in front of other LBLA and Forest Service employees at the all staff meeting; or that petitioner was fired from her position with LBLA after she refused to apologize to Haley for her conduct at the meeting. Indeed, as explained above, see, note 11, *supra*, the Attorney General's certification was not even necessarily inconsistent with Haley having played some role in events leading to petitioner's termination.

What the Attorney General's scope certification did deny was that Haley caused petitioner's termination out of personal "enmity" in "retaliation for plaintiff filing a preference inquiry." Luber App. 7. As we understand the *Wood* decision, the First Circuit would classify that certification as one that "den[ies] facts that amount to a 'characterization' or 'description,'" rather than one that "denies the existence of any harm-causing incident at all." 995 F.2d at 1129. However, the fine parsing of allegations and evidence necessary in an attempt to apply the *Wood* distinctions to this case illustrates the er-

ror in adding further limitations and complications on the Attorney General's certification authority that have no basis in the statutory text.

The Attorney General made a determination that Haley was acting within the scope of his employment "at the time of the incident out of which [petitioner's] claim arose." 28 U.S.C. 2679(d)(1). Under this Court's decision in *Lamagno*, petitioner was free to request judicial review of that determination. 515 U.S. at 420. But it should be equally clear that, like the defendants in *Willingham*, Haley had the right to "present [his] version of the facts," and to have "the validity of [his federal] defense[]" of Westfall Act immunity "determined in the federal courts." 395 U.S. at 409 (emphasis added).

III. BECAUSE CONGRESS SPECIFIED THAT THE ATTORNEY GENERAL'S CERTIFICATION IS CONCLUSIVE FOR PURPOSES OF REMOVAL, THE DISTRICT COURT WAS WITHOUT AUTHORITY TO REMAND THE CASE TO STATE COURT

Section 2679(d)(2) provides that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal." 28 U.S.C. 2679(d)(2). Despite that language, the district court remanded the case to state court once it had determined that petitioner had "adequately alleged conduct on Mr. Haley's part that, if proven, would give rise to tort claims * * * and fall outside the scope of his employment." Pet. App. 24a. The plain language of Section 2679(d)(2) precludes such a remand. Moreover, contrary to petitioner's contentions (Pet. Br. 32-34, 39-40), giving effect to the clear statutory text does not violate Article III of the Constitution.

A. The Language of the Westfall Act Gives The Attorney General's Certification "Conclusive" Effect For Purposes Of Removal Jurisdiction

A district court lacks authority to remand to state court an action that the Attorney General has removed after certifying

that the employee was acting within the scope of his employment, even if the court later determines that the employee was not acting within the scope of his employment. That conclusion is compelled by the plain language of Section 2679(d)(2) itself. See *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (in matters of statutory interpretation the "inquiries must begin[] with the language of the statute itself"). By emphasizing that the Attorney General's certification "shall *conclusively* establish scope of office or employment for purposes of removal," 28 U.S.C. 2679(d)(2) (emphasis added), Congress made clear that the certification establishes the district court's removal jurisdiction once and for all. Petitioner's construction would deprive the Attorney General's certification of its "conclusive[]" character.

In *Lamagno*, all nine Justices agreed that Congress intended the Attorney General's certification to establish "conclusively" the district court's removal jurisdiction. See also *Aliota*, 984 F.2d at 1356 (Alito, J.) (holding that the conclusion that "the district court has no authority to remand the case on the ground that the Attorney General's certification was erroneous" is "dictated by the plain language of 28 U.S.C. § 2679(d)(2)").

A plurality of four Justices in *Lamagno*—Justice Ginsburg, joined by Justices Stevens, Kennedy, and Breyer—rejected an objection that "[t]reating the Attorney General's certification as conclusive for purposes of removal but not for purposes of substitution" raised a potential Article III problem because, if the certification were overturned, the federal court might "be left with a case without a federal question to support the court's subject-matter jurisdiction." 515 U.S. at 434-435. The plurality found that argument unpersuasive, concluding that the scope-of-employment issue under the Westfall Act "is a significant federal question" and that removal by the Attorney General on his certification therefore "raises [a] questio[n] of substantive federal law at the very outset" of the litigation. *Id.* at 435 (quoting *Verlinden B.V.* v.

Central Bank of Nigeria, 461 U.S. 480, 493 (1983)). The plurality reasoned that "'[c]onsiderations of judicial economy, convenience and fairness to litigants' * * * make it reasonable and proper for the federal forum to proceed beyond the federal question to final judgment once it has invested time and resources on the initial scope-of-employment contest." *Id.* at 436 (quoting *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966)). Footnote 10 of the majority opinion, which Justice O'Connor joined, also recognized that the "conclusiv[e] . . . for purposes of removal" language of Section 2679(d)(2) reflected Congress's decision "to foreclose needless shuttling of a case from one court to another." *Id.* at 433 n.10. In her separate concurring opinion, however, Justice O'Connor specifically declined to decide the Article III question because it was "not presented in this case." *Id.* at 437.

In Justice Souter's dissenting opinion—in which Chief Justice Rehnquist and Justices Scalia and Thomas joined—he agreed that "there is nothing equivocal about the Act's provision that once a state tort action has been removed to a federal court after a certification by the Attorney General, it may never be remanded to the state system." *Lamagno*, 515 U.S. at 440 (citing 28 U.S.C. 2679(d)(2)). The dissent expressed the view, however, that, for this reason, judicial review of the Attorney General's scope-of-employment certification would raise a serious question whether the retention of jurisdiction if the district court rejected the United States' substitution would "cross the line" of the courts' Article III jurisdiction. *Id.* at 441.

That Congress intended the text to be given the plain meaning attributed it by the Court is further supported by the notable contrast between Section 2679(d)(2) and Section 2679(d)(3), which governs judicial review of the Attorney General's refusal to certify scope of office or employment. If the employee petitions for review of the Attorney General's refusal to certify in a case that is pending in state court, the Attorney General may remove the case to federal district

court, which must then resolve the scope-of-employment dispute. 28 U.S.C. 2679(d)(3). In contrast to removal after the Attorney General has certified that the employee was acting within the scope of his employment—in which case, that certification is "conclusive[] * * * for purposes of removal," 28 U.S.C. 2679(d)(2)—Section 2679(d)(3) provides that when the Attorney General removes a case to defend against an employee's petition for judicial certification over the Attorney General's objection, and the district court rejects the employee's petition, "the action or proceeding *shall be remanded* to the State court." 28 U.S.C. 2679(d)(3) (emphasis added).

This pointed contrast confirms that Congress did not envision remand in cases removed pursuant to the Attorney General's certification, but intended, consistent with the plain language of 28 U.S.C. 2679(d)(2), that such cases remain in federal court. See *Russello* v. *United States*, 464 U.S. 16, 23 (1984) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Field* v. *Mans*, 516 U.S. 59, 67 (1995) (quoting *Russello*, 464 U.S. at 23); *United States* v. *Naftalin*, 441 U.S. 768, 773-774 (1979)). Indeed, if, as the district court believed, the Attorney General's certification is conclusive neither of the scope-of-employment issue itself (as the Court held in *Lamagno*), nor of the court's removal jurisdiction, the term "conclusive" would be deprived of all meaning. The certification has to be "conclusive" as to something, and the text makes clear it is conclusive "for purposes of removal."

Petitioner in fact concedes that, in other Westfall Act cases, the term "conclusively" has the import described above, and thus "foreclose[s] needless shuttling of a case from one court to another." Pet. Br. 38 (quoting *Lamagno*, 515 U.S. at 433 n.10). Petitioner contends, however, that the Attorney General's certification in this case was not entitled to be treated as "conclusive" for purposes of removal jurisdiction

because, in petitioner's view, it was not the type of "certification" authorized by Section 2679(d)(2) and was therefore a legal nullity. See *ibid.* ("an incident-denying certification cannot establish *anything* for purposes of removal, much less establish it conclusively"). We have already explained that the Attorney General need not accept the truth of the plaintiff's allegations in rendering his scope-of-employment determination and has a right to have any disputes relating to scope of employment resolved in a federal forum. See, pp. 28-41, *supra*. It follows, for the same reasons, that the Attorney General's certification was not a nullity and should have been treated as conclusive for purposes of the district court's removal jurisdiction.

B. Giving Conclusive Effect To The Attorney General's Certification Is Not Contrary To Article III

Because the meaning of the statutory language is clear, the only basis for not giving conclusive effect to the Attorney General's certification for purposes of removal would be a determination that the statute violates Article III's "arising under" requirement. As explained below, Congress did not violate Article III by directing the district court to retain jurisdiction of a case removed from state court on the Attorney General's certification of statutory immunity after the court has resolved that threshhold federal question.

1. Although the "well-pleaded complaint" rule generally holds that a "defense that raises a federal question is inadequate to confer federal jurisdiction," *Merrell Dow Pharms. Inc.* v. *Thompson*, 478 U.S. 804, 808 (1986), that rule is not compelled by Article III. The "Article III 'arising under' jurisdiction is broader than federal question jurisdiction under § 1331." *Verlinden*, 461 U.S. at 495. It is a "broad conception" under which "Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law." *Id.* at 492 (discussing *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824)).

In *Mesa*, the Court observed that Congress is free to specify that "the raising of a federal question" in a federal officer's removal petition under Section 1442(a) "constitutes the federal law under which the action * * * arises for Art. III purposes." 489 U.S. at 136. Moreover, the Court stressed that Article III is satisfied if the defendant "allege[s] a *colorable* defense under federal law." *Id.* at 129 (emphasis added).[12] The ultimate "validity of the defense" is not essential to "the question of jurisdiction." *Ibid.* (quoting *Cooper*, 73 U.S. (6 Wall.) at 254). See *Jefferson County*, 527 U.S. at 431 ("We * * * do not require the officer virtually to 'win his case before he can have it removed.'") (quoting *Willingham*, 395 U.S. at 407).

In *Verlinden*, the Court similarly rejected an Article III challenge to the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, which confers federal jurisdiction over any suit against a foreign state, *ibid.*, even though the substantive claim is usually one that arises under state law, see 28 U.S.C. 1606. The Court found it unnecessary to "decide the precise boundaries of Art. III jurisdiction * * *, since the present case does not involve a mere speculative possibility that a federal question may arise at some point in the proceeding," but, rather, "necessarily raises questions of substantive federal law"—the immunity of a foreign state from suit—"at the very outset, and hence clearly 'arises under' federal law, as that term is used in Art. III." *Verlinden*, 461 U.S. at 493.

2. Under the Westfall Act, the Attorney General's certification that the employee acted within the scope of his employment and is therefore entitled to immunity satisfies any requirement that the case present a "colorable" claim of immu-

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[12] The Court did not decide whether Article III would permit Congress to vest federal courts with a protective removal jurisdiction over all claims against a federal officer, or whether Article III requires at least the assertion of a colorable defense where the suit does not otherwise fall within diversity or federal-question jurisdiction. See *Mesa*, 489 U.S. at 136-138.

nity. Under the statutory scheme, once the Attorney General makes that certification, substitution of the United States and removal to federal court are automatic. See 28 U.S.C. 2679(d)(2). In *Lamagno*, this Court held that the Attorney General's determination regarding the scope of employment is "subject to judicial review." 515 U.S. at 434. That is not the same, however, as stating that the Attorney General's certification is meaningless. To the contrary, it stands as "a Government official's determination of a fact or circumstance" that is subject to the presumption of "judicial review of executive action." *Id.* at 424. It can hardly be doubted that "judicial review of executive action" presents a federal question sufficient to sustain Article III jurisdiction.

Moreover, the Westfall Act is far more than a "pure jurisdictional" statute, such as Section 1442, that purports simply to accord jurisdiction over a defined class of claims or persons. See *Mesa*, 489 U.S. at 136. Rather, the Westfall Act, like the FSIA, is a "comprehensive scheme" comprising both pure jurisdictional provisions (removal) and further provisions of federal law (immunity and other procedural and substantive limitations on liability) capable of supporting Article III "arising under" jurisdiction. See *Verlinden*, 461 U.S. at 496-497. See also *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004).

Specifically, like the FSIA, the Westfall Act does not merely govern access to federal court, but governs as well the type of cases that may be removed (tort cases certified by the Attorney General under Section 2679(d)(2) or denied certification but challenged by the employee under Section 2679(d)(3)), the standard for assessing the propriety of the substitution of the United States for the employee (scope of employment), and the consequences of such substitution of the United States (immunity from suit for the employee and applicability of all the defenses available to the United States under the FTCA). Thus, just as the FSIA "comprehensively regulat[es] the amenability" of foreign sovereigns "to suit in

the United States," the Westfall Act "comprehensively regulat[es] the amenability" of federal employees to suit in both federal and state courts, *Verlinden*, 461 U.S. at 493, and the amenability of the United States to suit in substitution for its employees. As *Verlinden* holds, the presence of such a comprehensive regulatory scheme is alone sufficient for Article III purposes.

The parallel to *Verlinden* is especially close in that under both the Westfall Act and FSIA "the rule of decision may be provided by state law." 461 U.S. at 491. Nonetheless, just as there was a strong federal interest in *Verlinden* in the question of what types of suits may be brought against foreign sovereigns, *id.* at 493 there is a similar undeniable federal interest in allowing federal courts to adjudicate tort actions involving federal employees who have been certified by the Attorney General as having acted within the scope of their employment. See *Lamagno*, 515 U.S. at 426.

Even in a case in which the employee is ultimately held to have acted outside the scope of his employment, the district court's substantive review of the Attorney General's scope certification and resolution of the availability of federal immunity is sufficient to confer jurisdiction over the whole of the case, including the state claims that remain against the employee individually. As the Court has held in the Section 1442 context, as long as the claim of immunity is colorable, "the validity of the defense" "has no connection whatever to the question of jurisdiction." *Mesa*, 489 U.S. at 129 (quoting *Cooper*, 73 U.S. (6 Wall.) at 254). Rather, "if there be a single [federal] ingredient in the mass, it is sufficient. *That element is decisive upon the subject of jurisdiction.*" *Ibid.* (quoting *Cooper*, 73 U.S. (6 Wall.) at 252). That conclusion is consistent with the long-settled rule, discussed above, that once the stat-

utory jurisdiction of an Article III case attaches at the outset of a case, subsequent events do not destroy it.[13]

In *Gibbs*, the Court held that, as long as the federal question that supports the district court's jurisdiction and any related state claims "derive from a common nucleus of operative fact," then "there is *power* in federal courts to hear the whole," 383 U.S. at 725. The power to adjudicate the state claims continues, even after the federal claim has been dismissed. See *Rosado* v. *Wyman*, 397 U.S. 397, 403-405 (1970). And the Court has recognized that "the argument for exercise of pendent jurisdiction is particularly strong" when "the state claim is * * * closely tied to questions of federal policy," including when there is an issue of federal preemption, though not one that supports statutory federal question jurisdiction. *Gibbs*, 383 U.S. at 727. Plainly, if the courts have discretion to exercise such pendent jurisdiction, Congress has the power to direct them to do so. The text of the Westfall Act demonstrates that Congress believes that "'[c]onsiderations of judicial economy, convenience and fairness to litigants' * * * make it reasonable and proper for the federal forum to proceed beyond the federal question to final judgment once it has invested time and resources on the initial scope-of-employment contest." *Lamagno*, 515 U.S.. at 436 (plurality opinion of Ginsburg, J.) (quoting *Gibbs*, 383 U.S. at 726). By making the Attorney General's scope certification "conclusiv[e] * * * for purposes of removal," 28 U.S.C. 2679(d)(2), Congress "de-

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[13] We note that, if the Court were to adopt the district court's approach to the question discussed in Point II, *supra*, remand to the state court would be particularly inappropriate. If a scope-of-employment certification is overturned for the sole reason that it is unsupported by the particular facts alleged up to that point by the plaintiff in support of her claims, it is entirely possible that discovery would reveal evidence that purportedly tortious acts *were* within the scope of the defendant's employment. Thus, under the district court's approach, the federal question of Haley's statutory immunity would be present throughout the litigation, and the factual question would subsist.

cided to foreclose needless shuttling of a case from one court to another." *Lamagno*, 515 U.S. at 433 n.10.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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STATUTORY APPENDIX

Title 28 of the United States Code provides in part:

§ 1346. United States as defendant

* * * * *

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

§ 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under

any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

* * * * *

§ 1447. Procedure after removal generally

* * * * *

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

* * * * *

§ 2679. Exclusiveness of remedy

* * * * *

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the

claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

* * * * *

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be

substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

* * * * *

No. 05-593

Supreme Court, U.S.
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In The Supreme Court of the United States

PAT OSBORN,

Petitioner,

v.

BARRY HALEY, ET AL.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENTS, GAYE VERDI f/k/a GAYE LUBER AND LAND BETWEEN THE LAKES ASSOCIATION, INC.

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QUESTIONS PRESENTED

1. Whether a federal employee is entitled to have the district court determine the truth of the plaintiff's controverted allegations before denying immunity to the employee based solely on the nature of the conduct or tort alleged, once the Attorney General has certified that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose," under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), 28 U.S.C. § 2679(d).

2. Whether the Westfall Act's provision that the "certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal" of the suit from state court, 28 U.S.C. § 2679(d)(2), means that a district court must retain jurisdiction over the removed suit, even if the court ultimately overturns the Attorney General's scope-of-employment certification and declines to substitute the United States as the defendant.

3. Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. § 1447(d).

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is under review are Pat Osborn, Barry Haley, Gaye Verdi, f/k/a as Gaye Luber (hereinafter "Verdi"), and Land Between the Lakes Association, Inc. (hereinafter "LBLA").

Pursuant to Sup. Ct. R. 29.6, Respondent Land Between the Lakes Association, Inc., states that it is not the subsidiary of any other corporate entity, and no publicly held corporation owns more than ten percent (10%) of its stock.

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STATUTORY PROVISIONS INVOLVED

This matter involves interpretation of the Federal Employees Liability Reform and Tort Compensation Act of 1988, also known as the Westfall Act, 28 U.S.C. § 2679(d), the full text of which appears as App. A hereto; the general remand statute, 28 U.S.C. § 1447, attached as App. B hereto; and the federal officer removal statute, 28 U.S.C. § 1442, attached as App. C. 28 C.F.R. §§ 15.3 and 15.4 are also referenced herein and attached as App. D.

STATEMENT OF THE CASE

Petitioner Osborn contends Respondent LBLA terminated her employment because she filed an inquiry with the United States Department of Labor to determine whether a separate entity, the nearby U.S. Forest Service office, had considered her "veterans' preference points" before rejecting her application for federal employment. (Compl., App. A to Verdi's Br. in Opp'n 1-5.) Osborn sued LBLA and its Executive Director, Respondent Verdi, in state court for common law wrongful discharge and related torts, and sued Respondent Haley, the Forest Service's Business Manager, for interfering with Osborn's employment relationship with LBLA. (*Id.* 1-15.) Petitioner asserts that the United States, after removing the case to federal court, conceded that its employee Barry Haley's alleged conduct was outside the scope of his federal employment, so that the only question in dispute was whether these allegations were true. This seriously misconstrues the district court record as it applies to the issues before this Court.

The United States' Notice of Removal pointed out that Osborn alleged: (1) that she was a Volunteer Coordinator employed by LBLA, a contractor to the U.S. Forest Service; (2) that she was terminated for "not being a good Forest Service partner;" and (3) that Haley was employed as Business Manager for the Forest Service "at all times relevant" to her complaint. (Notice of Removal, R. 1; *see* Compl., App. A to Verdi's Br. in Opp'n 2, 4.) The Acting U.S. Attorney (by her authority delegated from the Attorney General under the Westfall Act)[1] had certified that the named federal defendant was acting within the scope of employment at the time of the alleged conduct. (Certification, App. C to Verdi's Br. in Opp'n 23.) Accordingly, the United States asserted the defense of immunity on Haley's behalf and requested removal to federal court under the federal officer removal statute, 28 U.S.C. § 1442, as well as the Westfall Act, 28 U.S.C. § 2679. (Notice of Removal, R. 1.)

In its Answer, the United States specifically denied the allegations that Haley acted outside the scope of his employment. (*Compare* Compl. ¶¶ 29, 34, 41, App. A to Verdi's Br. in Opp'n 7, 8, 10, *with* U.S.'s Answer ¶¶ 14 (denying ¶ 29 of the Complaint), 16 (denying ¶ 34 of the Complaint), 19 (denying ¶ 41 of the Complaint), App. B to Verdi's Br. in Opp'n 18-19.) The U.S. Attorney's Certification contained no further explanation and no concession that Haley's alleged actions would have been outside the

[1] Congress authorized the Attorney General to make such certifications. 28 U.S.C. §§ 2679(d)(1) and (2). The Attorney General has delegated this authority by regulation to United States Attorneys, who make certification decisions in consultation with the Department of Justice. *See* 28 C.F.R. §§ 15.3, 15.4 (2005).

scope of his employment even if they had occurred. (Certification, App. C to Verdi's Br. in Opp'n 23.) The United States then filed a Notice of Proposed Substitution seeking to substitute the Government as defendant (Notice of Proposed Substitution, R. 11), and moved to dismiss Osborn's Complaint, citing her need to exhaust administrative remedies under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.*, before proceeding against the United States. (*See* U.S.'s Mot. to Dismiss, App. D to Verdi's Br. in Opp'n 24-29.) Like the United States' Answer, the Motion contains no concession that Haley's alleged acts would have been outside the scope of his employment if they occurred. (*See id.*)

Osborn responded to the Motion by arguing that the following alleged facts demonstrated Haley acted outside the scope of his employment: (1) the Complaint alleges that Haley "induced, persuaded, or coerced defendant Gaye Luber [now Verdi] to discharge plaintiff of her job . . . "; (2) a Memorandum of Understanding between the U.S. Forest Service and the LBLA stated that Forest Service employees would not participate in any LBLA decision concerning "hiring or firing" LBLA employees; and (3) Robert Kuenzli, a Department of Labor investigator, stated in a letter that Petitioner was fired because Kuenzli called Haley. (*See* Pl.'s Resp. to U.S.'s Mot. to Dismiss, J.A. 17-20.) However, in addition to presenting double hearsay, the same letter described a meeting wherein Osborn drew a "big laugh" by criticizing Haley in the workplace in front of nearly 80 people, resulting in her boss's request that she apologize to Haley; all before Kuenzli ever contacted Haley. (Ex. C to Pl.'s Resp. to U.S.'s Mot. to Dismiss, App. E to Verdi's Br. in Opp'n 30-33.) The letter also stated that Osborn told Kuenzli that her boss, Tamara

Newkum, said that Haley had demanded she terminate Osborn for insubordination. (*Id.*) Further, when Kuenzli asked Osborn what caused the insubordination, "she explained that it was the comment she made at the staff meeting to Mr. Haley." (*Id.*) Thus, Kuenzli's own account indicates Osborn's termination resulted from the comment made at the staff meeting – before Kuenzli's phone call – and that Osborn understood this.

In reply, the United States pointed out that the Petitioner never alleged any facts showing that Haley acted outside the scope of his employment; rather, the Complaint (at ¶ 6) stated that Haley was "employed by the Forest Service at all times related to the complaint." (U.S.'s Reply to Pl.'s Resp. to U.S.'s Mot. to Dismiss, J.A. 35, 37.) The allegations that Haley "wrongfully and maliciously induced, persuaded, or coerced defendant Gaye Luber [now Verdi] to discharge plaintiff" were merely conclusory, the Government argued, and presented no facts supporting the contention that Haley acted outside the scope of his employment; i.e., there were no specific allegations that Haley even attempted to affect Osborn's employment. (*Id.*, J.A. 38.) Nowhere in its Reply did the Government concede that Haley's alleged acts were outside the scope of his employment if they occurred. Instead, the Reply merely pointed out that the Petitioner failed to meet her burden of proving Haley acted outside his federal employment. (*Id.*, J.A. 36.)[2]

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[2] The courts of appeal agree this burden shifts to the plaintiff upon certification by the Attorney General. (*See* U.S.'s Reply, J.A. 36 (citing *Borneman v. United States*, 213 F.3d 819, 827 (4th Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001); *Day v. Mass. Air Nat'l Guard*, 167 F.3d 678, 685 (1st Cir. 1999); *Taboas v. Mlynczak*, 149 F.3d 576, 581 (7th Cir.

(Continued on following page)

When the district court then issued its Memorandum and Order overruling the Certification, the court mistakenly concluded that

> the United States does not deny any of the factual allegations contained in Ms. Osborn's complaint, i.e., that Mr. Haley talked with Ms. Luber regarding Ms. Osborn's complaint to the Department of Labor. Instead, the United States only disputes her legal conclusion that Mr. Haley was acting in his individual capacity during the relevant times.

(D. Ct. Mem. & Order, App. D to Pet. Cert. 22a.) To be precise, the United States could not literally have denied such a specific factual allegation, because Osborn never made it. As set forth above, however, the United States did point out the absence of such, and specifically denied Osborn's conclusory allegation that Haley induced her termination – in addition to denying that Haley acted outside the scope of his employment.

The district court apparently recognized that a plaintiff cannot defeat a motion to dismiss after the United States substitutes itself as a defendant merely by relying upon the factual allegations in his complaint. (*Id.*, App. D 21a-22a (citing *Gilbar v. United States*, 108 F. Supp. 2d 812, 816-17 (S.D. Ohio 1999), *aff'd*, 229 F.3d 1151 (unpublished table opinion), 2000 WL 1206538 (6th Cir. 2000)).)

1998); *Palmer v. Flaggman*, 93 F.3d 196, 198 (5th Cir. 1996); *Flohr v. Mackovjak*, 84 F.3d 386, 390 (11th Cir. 1996); *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995); *Richman v. Straley*, 48 F.3d 1139, 1145 (10th Cir. 1995); *Kimbro v. Velten*, 30 F.3d 1501, 1505 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995); *Melo v. Hafer*, 13 F.3d 736, 747 (3d Cir. 1994)).)

Nonetheless, the district court concluded that no evidentiary hearing was needed because there was no conflicting evidence as to a material fact, noting that "Ms. Osborn need not provide additional proof of an undisputed fact absent any challenge to those facts by the United States." (*Id.*, App. D 22a, 23a n.2.) The court then ruled the alleged conduct, if it occurred, was outside the scope of Haley's employment under Kentucky law, in part because "there is no indication – or even argument – that any of Mr. Haley's actions, if proven, furthered the Forest Services' goals." (*Id.*, App. D 23a.) The court accordingly overruled the Attorney General's "declaration of substitution and/or certification," resubstituted Haley as a defendant,[3] and remanded the case to state court. (*Id.*, App. D 24a, 25a; D. Ct. Order, App. C to Pet. Cert. 17a.)

Contrary to her present argument that remand following such a ruling was required, Osborn had not requested remand in opposing the United States' Motion. Instead, she asked the court to lift the stay on discovery so that the case could move forward against Haley in federal court. (Pl.'s Resp. to U.S.'s Mot. to Dismiss, J.A. 20; Tendered Order attached to Pl.'s Resp., R. 15.)

In its Motion to Reconsider, the United States reminded the court that it had indeed vigorously contested Petitioner's allegations, and further attached Declarations from the individual defendants stating that they had never discussed Osborn's "veterans' preference" inquiry.

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[3] The court did not designate its action as "resubstitution," but this was its practical effect given the automatic substitution of the United States following certification. *See* 28 U.S.C. § 2679(d)(2) (directing that the United States "shall be substituted as the party defendant" upon certification).

(U.S.'s Mot. to Recons., J.A. 40-45, 51-54.) Thus, the United States was compelled to supplement the record with specific, sworn statements refuting allegations that the Petitioner had never specifically made. At the same time, assuming "for the sake of argument only" that Haley and Verdi "interacted regarding plaintiff's employment," the United States argued that Haley's alleged conduct in causing Osborn's firing could be construed as furthering his employer's goal of "partnering with competent contract employees in a healthy and productive work environment. . . . " (*Id.*, J.A. 47.)

In responding to the United States' Motion to Reconsider, Osborn merely repeated her allegations that (1) Verdi met with her to discuss problems with her employment on the same day that Haley learned she had filed a complaint with the Department of Labor, and (2) she was terminated by Verdi two days later. (Pl.'s Resp. to U.S.'s Mot. to Recons., R. 23.) Again, she failed to allege any contacts between Haley and Verdi regarding her employment.

Finally, in its order denying the United States' Motion to Reconsider, the district court accepted that it is "highly unlikely," in light of Haley's affidavit, that Osborn could develop proof demonstrating that Haley "interacted with Verdi regarding Osborn's employment." (D. Ct. Order, App. B to Pet. Cert. 14a.) Nevertheless, the district court further explained that it could neither decide the basic question of whether the communication occurred at all, nor consider the United States' alternative legal argument that inducing Osborn's termination could have benefitted Haley's employer and been within the scope of his employment, as this would contradict Haley's declaration under oath. (*Id.*, App. D 14a-15a.)

Thus, having previously overruled the Certification without a hearing because the United States had supposedly failed to deny the underlying "allegations," the district court later held that it must sustain its ruling without a hearing because it could not consider the United States' proof refuting the underlying "allegations." Further, the district court simply declined to consider the alternative legal argument that a Forest Service representative could conceivably act within the scope of his employment in attempting to influence a contractor to provide cooperative employees. Inherent in this rationale is the court's conclusion that Haley's involvement in Osborn's termination for any reason, whether related to the Department of Labor inquiry or otherwise, would have necessarily been outside the scope of his employment as a matter of law.

In summary, the United States never conceded that Petitioner's conclusory allegations, or her implied but never-stated underlying factual allegations, described conduct outside the scope of Barry Haley's employment. This is not the "simple and stark" case Petitioner suggests, as when the parties agree that the defendant/employee's alleged conduct was necessarily outside the scope of his employment under any version of the facts which could be presented. Rather, this is a case in which the federal employee has been denied immunity even though matters relevant to both the characterization of his alleged conduct and whether it occurred at all have not yet been fully heard.

SUMMARY OF ARGUMENT

The Westfall Act provides, without qualification, that the Attorney General's certification shall "conclusively" establish scope of office or employment for purposes of removal only. The Court should give effect to this plain declaration, and thereby reconcile all legal principles and authorities pertinent to this dispute. Congress has effectively foreclosed judicial review of removal jurisdiction, while allowing judicial review of the question of scope of employment – i.e. immunity – as determined by *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995). This approach satisfies the Constitution because the distinctly federal question of immunity is present in these cases from the outset, even when the underlying facts are in dispute.

Question 1:

Petitioner contends the Attorney General had no authority under the Westfall Act to deny her factual allegations but simultaneously certify that Respondent Haley acted within the scope of his employment. The Attorney General's authority, however, is unrestricted by the statute. The relevant question is not the scope of the Attorney General's authority to issue a certification, but the proper scope of judicial review of that certification when the underlying facts are in dispute. Petitioner asks the Court to preclude judicial review in such cases, automatically denying immunity even to federal employees who are falsely accused, based solely on the nature of the conduct alleged. The purpose and language of the Westfall Act prohibit this approach. Under the statutory scheme, once the Attorney General certified Respondent Haley was acting within the scope of his federal employment, Haley

was entitled to have the district court determine the truth of the plaintiff's controverted allegations before deciding his immunity.

Congress made no exception in the Westfall Act for so-called "incident-denying" certifications, and the Court should not create one. The legislative history shows Congress intended to restore, to federal employees who acted within the scope of their employment, the immunity and protection against having to "subject their personal resources to the lottery of a jury trial" that they had enjoyed before the holding in *Westfall v. Erwin*, 484 U.S. 292 (1988). To preclude removal, certification and substitution for falsely-accused employees would automatically deny them judicial review of the scope of employment question due solely to the wording of the complaint – even though they necessarily acted within the scope of their employment at all times. Yet the same exception would guarantee judicial review only for those employees who actually committed the alleged conduct and may therefore have acted beyond the scope of their employment.

Lamagno held that judicial review is indispensable before a final determination of immunity. This should be no less true for defendants than it is for plaintiffs; otherwise, the plaintiff, rather than the district court, will become "sole judge in her own cause." *Lamagno* itself involved an "incident-denying" certification, and the opinion recognizes that judicial review will include determinations of fact. Such determinations are distinct from resolving the merits. They are nonetheless prerequisite to resolving the absolute immunity defense raised in Westfall Act cases, because the court cannot decide the legal question of whether the defendant acted within the scope

of his employment without first determining what he actually did at the time of the incident alleged.

If the government employee must try the case to disprove facts relevant to scope of employment, as Petitioner advocates, then his immunity has already been lost. This reality distinguishes Westfall Act cases from qualified immunity cases, in which the court can typically decide at the beginning of the case, from the pleadings and published law alone, whether the plaintiff claims a violation of "clearly established law." This Court's pre-*Westfall* holdings allowed government employee defendants to deny the allegations and challenge the lack of supporting evidence relevant to immunity through summary judgment motions. Since Congress sought to restore federal employees' immunity to its pre-*Westfall* status, it is not reasonable to interpret the Westfall Act as destroying the employees' right to put plaintiffs to their proof.

Section 2679(d)(3) has been interpreted to allow judicial determination of the underlying facts during review of the Attorney General's refusal to certify. Logically, when the Attorney General has certified that a federal employee was acting within the scope of his employment, the employee should be entitled to the same factual review before having the certification overturned and his immunity revoked.

The "scope of employment" analysis under § 2679(d) is also analogous to the "color of office" inquiry under the federal officer removal statute, which allows removal if the officer's relationship to the plaintiff derived from his official duties; the officer need not admit the plaintiff's allegations in order to establish federal jurisdiction.

Petitioner's own court filings establish such a relationship with Respondent Haley.

As illustrated by the district court proceedings in this case, the "incident denial" exception Petitioner asks the Court to read into the statute would also deny falsely-accused federal employees their right under the Civil Rules to deny the allegations but plead in the alternative that a complaint describes conduct which, even if it were true, falls within the scope of employment. By contrast, interpreting the statute as written will impose no "burden" on plaintiffs, other than having to accept a federal judicial determination of the federal issue of the scope of a federal worker's employment – just as they do when an employee has challenged the Attorney General's refusal to certify.

Question 2:

Congress made the Attorney General's certification "conclusive" only for purposes of removal, while remaining silent as to judicial review of the question of scope of employment. Congress thus declared its intent to foreclose remand of such cases under any circumstances, even if the proceedings ultimately establish the federal defendant acted beyond the scope of employment. By contrast, Congress specifically required remand for "beyond the scope" cases removed without the Attorney General's certification. By omitting this requirement for Attorney General-certified removals, Congress made clear that such cases are to remain in federal court.

This Court has already determined, in the context of the federal officer removal statute, that the Constitution allows Congress to provide a federal forum for claims against federal employees, if the employee raises the

federal defense of immunity from the outset. Federal defendant Haley did so here, removing the case pursuant to both the officer removal statute and the Westfall Act. Accordingly, he was entitled to the federal forum Congress provided to him, consistent with Article III. The *Lamagno* plurality correctly concluded that Congress acted in accordance with Article III in prohibiting remand following the Attorney General's certification, as the significant federal question of immunity is present from the outset in such cases. Petitioner's attempt to portray the certification and removal of this case as somehow "unauthorized" has no support in the statute or the record. Even if the certification had been based solely on denial of the facts asserted by Petitioner, the Attorney General would still have been certifying that Haley acted within the scope of his employment – meaning the purely federal question of Haley's immunity would still have been present from the outset.

Question 3:

The court of appeals had jurisdiction to review this matter. The order resubstituting Haley as a defendant was immediately appealable under the collateral order doctrine as a conclusive denial of governmental immunity, an important issue separate from the merits and effectively unreviewable on appeal from a final judgment. The resubstitution order was also reviewable under *City of Waco v. U.S. Fid. & Guar. Co.*, 293 U.S. 140 (1934), as it logically preceded and could be "disaggregated" from the order remanding the case to state court. Unlike in *Kircher v. Putnam Funds Trust*, 547 U.S. ___, 126 S. Ct. 2145 (2006), in which the district court's order of dismissal pursuant to the Securities Litigation Uniform Standards Act resolved

all claims, here state law claims against Haley and these Respondents remain to be tried.

The remand order is reviewable as well under the exception to 28 U.S.C. § 1447(d) explained in *Thermtron Prods., Inc. v. Hermansdorfer,* 423 U.S. 336 (1976). This provision protects from appellate review only those remand orders invoking the grounds specified in § 1447(c); i.e., that removal was "improvident and without jurisdiction." A district court cannot remand a properly removed case on grounds it has no authority to consider. Here, unlike in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995) and *Kircher*, Congress had foreclosed any issue of removal jurisdiction through its "clear statutory command" that the Attorney General's certification would be conclusive for purposes of removal. Respondents' appeal was not a challenge to a district court's mere legal error in denying jurisdiction. Instead, Respondents maintain the district court lacked statutory authority to question its jurisdiction or to remand at all following certification. Allowing the district court to override Congress' statutory directive with impunity would effectively void § 2679(b)(2). Enforcing this provision would not weaken § 1447(d), which never comes into play when Congress has specifically acted to foreclose any jurisdictional disputes. Denying effect to the statute would also threaten the underpinnings of *Lamagno*; while enforcing it will reconcile the Court's prior holdings with the issues now at hand.

Petitioner's three arguments depend ultimately on the same two premises: (1) the Attorney General's certification in this case was based solely on denial of the underlying allegations; and (2) the scope of employment issue, and therefore the question of immunity, is never reached when the certification merely denies the allegations. For the

reasons stated herein, each premise is false. This is not merely an "incident-denying" case. Rather, this case involves the need for the district court to determine facts and hear legal arguments relative to the truth, characterization and effect of the defendant/federal employee's alleged conduct under Kentucky law defining scope of employment. Even if nothing were left to decide but the truth of the allegations, the court's ruling would still determine whether Haley is entitled to immunity, a federal question which has been present from the outset. For these reasons, the certification was authorized, the statutory prohibition of remand following certification is constitutional, and the district court acted beyond its authority in remanding the case to the state court, rendering its order subject to appellate review. This Court should exercise its jurisdiction to review the issues raised by Petitioner, and uphold Congress' constitutional power to provide a federal forum for claims against all federal officers and employees – including those who may be falsely accused.

ARGUMENT

I. The District Court Should Have Determined the Truth of the Plaintiff's Controverted Allegations Before Deciding Haley's Immunity.

A. Congress made no exception to the Westfall Act for so-called "incident-denying" certifications.

Under 28 U.S.C. § 2679(d)(2), the Attorney General may certify that the defendant employee was acting within the scope of his office or employment "at the time of the incident" from which the claim arose, upon which the

action shall be removed, or he may choose not to so certify. Congress imposed no qualification or restriction whatsoever on the Attorney General's authority to admit, deny, or consider the facts underlying the plaintiff's allegations in reaching this certification decision. Had it intended to do so, Congress might have used a phrase such as "when committing the conduct" instead of "at the time of the incident," as the latter wording leaves open the possibility that the employee may have been "on the job" when an incident occurred without participating in the specific conduct alleged. So long as the federal employee is acting in the course and scope of employment "at the time of the incident" – whether as described by the plaintiff or otherwise – the Attorney General may issue the Westfall Act certification.

To support her separate argument that federal jurisdiction was never present, Petitioner nevertheless misconstrues Congress' choice not to specifically authorize a so-called "incident-denying" certification as a limitation on the Attorney General's authority to certify. In fact, as illustrated above, the absence of an express limitation means exactly that. By mandating removal without qualification when the certification is in the employee's favor, Congress necessarily contemplated that the Attorney General would exercise judgment in making a certification in each case.

However, as the Court concluded in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), this does not mean that the Attorney General's certification, once made, is conclusive, except for purposes of removal as specifically stated in § 2679(d)(2). Thus, Congress left the accuracy of the certification – i.e. the question of the defendant's immunity from suit – open for judicial review. *Id.* As the

Sixth Circuit concluded, it is the scope of this judicial review, and specifically the district court's freedom to resolve factual disputes before denying immunity to the federal employee, which is properly at issue – not the Attorney General's authority to make the certification and remove the case to federal court. (*See* 6th Cir. Opinion, App. A to Pet. Cert. 4a, *available at Osborn v. Haley*, 422 F.3d 359 (6th Cir. 2005), *cert. granted,* 126 S. Ct. 2017 (2006).) Under Petitioner's approach, there in effect would be no judicial review for falsely-accused federal employees, because the district court's inquiry would stop upon the defendant's denial of the plaintiff's allegations.

B. Interpreting the Act to exclude the underlying facts from judicial review would unfairly deny immunity to falsely-accused federal employees.

Petitioner contends that district courts should simply assume the truth of the plaintiff's underlying allegations in all cases, and deny immunity to the defendant if the nature of the alleged acts is such that they would necessarily fall outside the scope of employment if they occurred. This argument overlooks the point that a defendant who did not commit the alleged "beyond the scope" conduct was necessarily acting "within the scope" of his employment at the time of the incident. It follows that under Petitioner's approach, a falsely-accused defendant who was entitled to immunity would not get immunity. He would still be entitled to defend the underlying claims, and of course would avoid liability if successful, but only at his own considerable expense. This is not immunity. Literally, it is denial of immunity without judicial review. Accordingly, it

would defeat the purpose and express provisions of the Westfall Act.

The legislative history shows Congress intended to restore, to federal employees who act within the scope of their employment, the immunity and protection against having to "subject their personal resources to the lottery of a jury trial" that they had enjoyed before the *Westfall* holding. *See* H.R. Rep. No. 100-700 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5947. The exception Petitioner seeks would undo this remedy and discriminate unfairly against federal employees falsely accused of any type of conduct or tort. Yet the same exception would illogically guarantee judicial review for those who actually committed the alleged conduct, and may therefore have acted beyond the scope of their employment. By contrast, interpreting the statute as written will impose no "burden" on plaintiffs, other than having to accept a federal judicial determination (now available to them pursuant to *Lamagno*) of the federal issue of the scope of a federal worker's employment, and try their underlying claims in federal court.

C. *Lamagno's* reasoning that judicial review is indispensable before a final determination of the immunity question should apply equally to defendants and plaintiffs.

Precluding removal, certification, and substitution for falsely-accused employees, as Petitioner advocates, would automatically deny them immunity without judicial review. In *Lamagno*, this Court essentially found that to protect the plaintiff, judicial review was indispensable before a final and binding determination granting immunity to the federal employee: "Thus, absent judicial review

and court rejection of the certification, Lamagno would be released from the litigation. . . ." *Lamagno*, 515 U.S. at 422. The determination is no less final and binding for the falsely-accused employee, and judicial review is therefore no more dispensable. In *Lamagno,* this Court declined to cast district court judges into the role of "petty functionaries," by insulating the Attorney General's certification from review and making her delegate "sole judge" with regard to the employee's immunity. *See id.* at 426, 429. Petitioner's approach would cast the hypothetical plaintiff, instead of the Attorney General, as "sole judge" in her own cause, by allowing her to decide immunity unilaterally through false accusations of torts that are by definition beyond the scope of employment, while requiring the district judge to act as a "petty functionary" in remanding such claims without first assessing the facts.

As Petitioner recognized, scope of employment "sets the line" according to *Lamagno*:

> If Lamagno is inside that line, he is not subject to petitioners' suit; if he is outside the line, he is personally answerable. The sole question, then, is *who decides* on which side of the line the case falls: the local United States Attorney, unreviewably or, when that official's decision is contested, the court.

Id. at 423-24. Applying this rationale here, it is irrelevant whether the defendant or the Attorney General denied the plaintiff's allegations. What matters is whether Barry Haley acted within the scope of his employment and who will decide whether he did so. This decision literally cannot be made without deciding the relevant facts, since they are in dispute. The Court in *Lamagno* declined to transfer the final scope of employment determination from

the district court to the United States Attorney as an interested party, absent an express directive from Congress to do so. By the same logic, it should not transfer the final determination to the plaintiff, who could then control the result through false allegations and/or artful pleading.

D. The Court's prior holdings suggest that judicial review in immunity cases may include factual determinations.

The Court inherently recognized in *Lamagno* that the district courts' review of certifications will include factual determinations: "In adjudicating the scope-of-federal-employment question 'at the very outset,' the court inevitably will confront facts relevant to the alleged misconduct, matters that bear on the state tort claims against the employee." *Lamagno,* 515 U.S. at 435; *see also id.* at 442 (Souter, J., dissenting) ("[L]itigating the question whether an employee's allegedly tortious acts fall within the scope of employment will, of course, always require some evidence to show what the acts were."). "Second, when a Government official's determination of a fact or circumstance – for example, 'scope of employment' – is dispositive of a court controversy, federal courts generally do not hold the determination unreviewable." *Id.* at 424. "The key question presented – scope of employment – however contestable in fact, would receive no judicial audience [under the defendant's interpretation]." *Id.* at 429.

Indeed, *Lamagno* involved an "incident-denying certification" revealed through the "crucible of litigation," as defined by Petitioner. (*See* Petr.'s Br. 19 n.5.) The scope of employment question before the Court involved allegations that the federal defendant, Lamagno, was intoxicated while driving, and that his passenger, an unidentified woman,

was not a federal employee. *Lamagno*, 515 U.S. at 420-21. The Fourth Circuit's more detailed description, on appeal following remand, confirms these allegations were in dispute. *See Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3d 1148, 1156-1159 (4th Cir. 1997), *cert. denied*, 522 U.S. 931 (1997). Lamagno's brief as Respondent also indicates that the Government had denied many of the Petitioner's allegations. *See* Brief For Respondent Dirk A. Lamagno at 2-3, *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995) (No. 94-167), 1995 WL 39033, at *6-7. In requiring judicial review of such an "incident-denying" certification, the Court must have contemplated that the district court's inquiry would include resolving factual determinations pertinent to the scope of Lamagno's employment.

Petitioner correctly contends that determining immunity is distinct from resolving the merits of the case. This does not mean that determining immunity cannot include determination of facts relevant to immunity. Factual determinations are prerequisite to resolving the absolute immunity defense raised in Westfall Act cases, because the court cannot decide the legal question of whether the defendant acted within the scope of his employment without first determining what the defendant actually did. If the employee must try the case to disprove facts relevant to scope of employment as Petitioner advocates, then his immunity has already been lost.

In the qualified immunity cases upon which Petitioner so heavily relies, the court can typically decide at the beginning of the case, from the pleadings and published law alone, whether the plaintiff has claimed a violation of "clearly established law." Certainly, both absolute and qualified immunity cases ultimately involve questions of

law that must be decided before trial. Orders denying both are effectively unreviewable on appeal from a final judgment, because immunity is "effectively lost if a case is erroneously permitted to go to trial," and orders denying both are therefore appealable before final judgment. *See Mitchell v. Forsyth*, 472 U.S. 511, 525-30 (1985); *see also infra* Part III(A)(1) (discussing collateral order doctrine). But this does not alter the fact that the court must consider the plaintiff's factual allegations in resolving the immunity issue. *Mitchell*, 472 U.S. at 529. In so doing, prior to *Westfall v. Erwin*, 484 U.S. 292 (1988), the district courts would grant summary judgment on grounds of immunity if the plaintiff could tender no competent evidence of conduct beyond the scope of the immunity; the fact that the defendant needed to contest the plaintiff's merits allegations to establish his immunity did not preclude summary judgment in his favor. *Melo v. Hafer*, 13 F.3d 736, 744-745 (3d Cir. 1994) (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987)). "If the defendant did not qualify for immunity on the facts alleged in the complaint, however, this did not mean the defendant had to go to trial." *Id.* at 745. Since Congress specifically sought to restore the early resolution of immunity which had been available before *Westfall*, it is not reasonable to suggest that Congress intended for the Westfall Act to destroy the federal employee's opportunity to deny the plaintiff's allegations relevant to immunity, and challenge the lack of supporting evidence thereof. *See id.* at 744 (citing H.R. No. 100-700 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5946). Even in qualified immunity cases in which the complaint adequately alleges acts that violate clearly established law, the defendant is entitled to summary judgment if discovery fails to create a genuine issue of fact regarding the alleged conduct.

Mitchell, 472 U.S. at 526. This is necessary to protect the defendant's "entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability. . . . " *Id.* Nothing in the line of qualified immunity cases Petitioner cites supports her argument that defendants who deny the allegations in the complaint automatically forfeit their immunity.

E. Section 2679(d)(3) allows judicial determination of the underlying facts when the Attorney General has refused to certify the employee was within the scope of employment, and it would be illogical to omit such determination when the Attorney General has so certified.

The four circuits that directly rejected the approach of *Wood v. United States*, 995 F.2d 1122 (1st. Cir. 1993) (en banc) (Breyer, J.) compared § 2679(d)(2) with § 2679(d)(3), which does not contain the "time of the incident" clause upon which the First Circuit relied. *See* 6th Cir. Opinion, App. A to Pet. Cert. 6a-7a, *available at Osborn v. Haley*, 422 F.3d 359, 363-64 (6th Cir. 2005), *cert. granted,* 126 S. Ct. 2017 (2006); *Heuton v. Anderson*, 75 F.3d 357, 360 (8th Cir. 1996); *Kimbro v. Velten*, 30 F.3d 1501, 1508 (D.C. Cir. 1995), *cert. denied,* 515 U.S. 1145 (1995); *Melo v. Hafer*, 13 F.3d 736, 746-47 (3d Cir. 1994). Section 2679(d)(3) merely requires the district court, when petitioned by the employee following the Attorney General's refusal to certify, to "find and certify [prior to substitution] that the employee was acting within the scope of his office

or employment." These courts pointed out that it is unlikely that Congress intended the Attorney General, in deciding whether to certify pursuant to (d)(2), to be more circumscribed by the plaintiff's allegations than the district court, in deciding whether to certify pursuant to (d)(3). *See id.* Petitioner does not contend that § 2679(d)(3) excludes the underlying facts from judicial review, and Respondents can find no case that so holds. The First and Ninth Circuits have recognized that the district court's role in reviewing challenges to the Attorney General's refusal to certify, brought pursuant to § 2679(d)(3), includes fact finding. *See Lyons v. Brown,* 158 F.3d 605 (1st Cir. 1998); *Green v. Hall,* 8 F.3d 695 (9th Cir. 1993) (per curiam); *Wang v. United States,* 947 F.2d 1400 (9th Cir. 1991); *cf. Snodgrass v. Jones,* 957 F.2d 482 (7th Cir. 1992) (holding that no hearing required prior to district court's determination under (d)(3) where not explicitly required by statute, and no facts were in dispute). The Court having now ruled in *Lamagno* that judicial review is available under (d)(2) as well as (d)(3), it would be even less logical to allow the district court to resolve factual disputes only when reviewing the Attorney General's refusal to certify that an employee was not "within the scope" of federal employment, and not when the Attorney General has certified that the employee was "within the scope." In each situation the district court will finally decide the question of the employee's immunity, and it should resolve any factual disputes before doing so. Nothing in either provision of the statute commands otherwise.

F. The analogous federal officer removal statute does not require the defendant to admit the plaintiff's allegations to secure removal.

By analogy, under the federal officer removal statute, 28 U.S.C. § 1442(a)(1) (App. C hereto), the federal officer need not admit the plaintiff's allegations to secure removal. *Willingham v. Morgan*, 395 U.S. 402, 408 (1969) (citation omitted). Rather, in this civil suit alleging assault by prison officials, the "color of office" test of § 1442(a) was met when the federal officer merely showed that his relationship to the plaintiff derived solely from his official duties. *Id.* at 409. The Court further explained:

> Past cases have interpreted the "color of office" test to require a showing of a "causal connection" between the charged conduct and asserted official authority. "It is enough that [petitioners'] acts or [their] presence at the place in performance of [their] official duty constitute the basis, though mistaken or false, of the state prosecution." In this case, once petitioners had shown that their only contact with respondent occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required "causal connection." The connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times. If the question raised is whether they were engaged in some kind of "frolic of their own" in relation to respondent, then they should have the opportunity to present their version of the facts to a federal, not a state, court. This is exactly what the removal statute was designed to accomplish.

Id. at 409 (citations omitted) (alterations in original).

Citing *Willingham,* a district court has held that a United States Navy superintendent was acting under color of his office in contacting a private employer concerning the prospective employment of a Navy civilian employee, and accordingly that a claim against him for tortious interference with contract was properly removed to federal court under § 1442(a)(1). *Areskog v. United States,* 396 F. Supp. 834 (D. Conn. 1975).

The "scope of employment" analysis under § 2679(d) is analogous to the "color of office" inquiry under § 1442(a). *See* 14C Charles Alan Wright and Arthur R. Miller, *Federal Practice & Procedure* § 3727 (3d ed. 1998). Here, like in *Areskog*, Petitioner's own filings – including her pleading that Haley was employed as Business Manager for the Forest Service "at all times relevant" to her complaint – effectively established that her relationship with Haley derived solely from his official duties. Her mere conclusory allegation that he nonetheless acted for his own purposes in affecting her employment should not be enough to deny Haley the opportunity to present his own version of the facts to a federal court, before it finally decides whether he is entitled to immunity.

G. Under the Civil Rules, federal defendants are entitled to simultaneously deny the plaintiff's allegations and challenge their characterization as beyond the scope of employment.

As illustrated in Mr. Haley's case, the exception Petitioner seeks would also deny falsely-accused federal employees the opportunity to contest "incident-characterizing" facts or allegations. That is, it would deny employees the opportunity to make the legal argument that a complaint

describes conduct that may fall within the scope of employment as a matter of law, depending on the ultimate facts showing the context of the incident. Such a defense is no different than pleading hypothetically or in the alternative, which is specifically sanctioned in Fed. R. Civ. P. 8(e)(2). Even the holdings in *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993) (en banc) (Breyer, J.), and *McHugh v. Univ. of Vt.*, 966 F.2d 67, 74 (2d Cir. 1992), the sexual harassment cases upon which Petitioner primarily relies, carefully distinguished challenges to the context or characterization of the defendant's alleged conduct which go beyond simple denials:

> The context of the alleged act that is relevant to the scope of employment issue is a matter of fact to be determined by the district court, however, after an appropriate factual hearing. Whenever scope of employment is disputed, substitution should be made only if the court finds that the alleged acts were within the scope of employment.

McHugh, 966 F.2d at 74-75.

The *Wood* court, whose primary conclusion Respondents believe was flawed, conceded that "the certificate need not accept the plaintiff's version of just *how* it occurred." *Wood*, 995 F.2d at 1123. In response to the defendant's concern that "Driver A" who admits negligence would receive immunity while less culpable "Driver B," who denies that any accident occurred, would not, the *Wood* court explained that "it could be so only where Driver A can claim that the underlying incident is job-related, while Driver B cannot make this claim, even hypothetically for argument's sake." *Id.* at 1127. Addressing the concern that a plaintiff might transform a job-related tort into a non-job-related tort simply by alleging

an "off-duty" state of mind or alleging that a negligent action was carried out intentionally, the court stated:

> Rather, we insist that the certificate assume some kind of harm-causing incident, while leaving the Attorney General free to dispute characterization of the incident and subsidiary immunity-related facts. The Second Circuit held the same in *McHugh*. 966 F.2d at 74. Moreover, we previously held that the Attorney General's certificate may contest a plaintiff's incident-describing and incident-characterizing facts and that the court may resolve any such factual conflicts, relevant to immunity, prior to trial.

Id. at 1129.[4]

Remand of this case to the district court for an evidentiary hearing on the scope of employment issue is consistent even with *McHugh* and *Wood*. Unlike in those cases, the Petitioner has not alleged conduct – such as sexual assault or rape – which is clearly not entitled to the protection of immunity if it occurred and would clearly be beyond the scope of employment under state law under any version of events. Instead, Osborn alleged torts that the district court correctly ruled are not actionable if undertaken with a "purpose to serve the employer." (D. Ct.

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[4] By way of illustration, the *Wood* court noted that in its earlier case, *Nasuti v. Scannell*, 906 F.2d 802 (1st Cir. 1990), the plaintiff had alleged that a federal employee intentionally injured him by driving fast in order to jostle him and throw him from side-to-side in the back of a truck. The court explained: "We assumed that these factual allegations, if true, would have placed Scannell's actions outside the 'scope of his employment' . . . but, we held the immunity certificate valid, pending a pre-trial evidentiary hearing that would resolve the key immunity-related factual dispute, namely whether Scannell intended to harm Nasuti." *Wood*, 995 F.2d at 1129 (citing *Nasuti*, 906 F.2d at 808).

Mem. & Order, App. D to Pet. Cert. 23a (citing *Am. Gen. Life & Accid. Ins. Co. v. Hall*, 74 S.W.3d 688, 692 (Ky. 2003)).) *See also Areskog v. United States*, 396 F. Supp. 834, 839-840 (D. Conn. 1975) (holding the naval superintendent immune as "within the outer perimeter of [his] line of duty" under *Barr v. Matteo,* 360 U.S. 564, 575 (1959) (plurality opinion), even though he committed the acts plaintiff characterized as tortious interference). Even criminal assault has been deemed within the scope of employment under Kentucky law, when intended to further the employer's purpose. *Patterson v. Blair*, 172 S.W.3d 361 (Ky. 2005).

Further, the United States articulated motives that could have justified Haley's alleged attempt to influence Osborn's employment as serving his employer. Osborn herself put forth documentation that she was fired because she engaged in public ridicule of a Forest Service official as a contractor's employee, pointedly undermining that official's (Haley's) attempt to address the quality of communications between the two organizations. This is hardly analogous to a case in which the only matter in dispute is whether the defendant committed a rape or sexual assault.

The instant matter also does not involve a situation in which the United States has merely denied the factual "allegations." Instead, the United States attempted to put the Petitioner to her proof, and then argued that even if Petitioner's allegations that Haley interfered with her employment were hypothetically true, Haley was entitled to a hearing to determine his intent or motive. Consistent with *Wood* and *Nasuti*, Haley should have been given the opportunity to contest Osborn's "incident-describing" and "incident-characterizing" allegations, which were merely

conclusory and did not even allege specific conduct. Paraphrasing the language of *Wood*, 995 F.2d at 1129, the district court should have considered all facts and arguments relevant to the context of Haley's alleged conduct, which could have been consistent with a legitimate business purpose.

Indeed, Petitioner effectively conceded that her claims against Haley describe conduct which can fall within the scope of employment under Kentucky law. Petitioner's claims against Respondent Verdi were essentially identical to those against Haley: she accused Verdi of discharging her in violation of public policy, conspiring to wrongfully discharge her, conspiring to interfere with her employment relationship, and committing outrageous conduct, all alleged to have been carried out in a "malicious, oppressive, and intentional manner in order to injure and damage plaintiff." (Compl., App. A to Verdi's Br. in Opp'n 1-15.) In each instance, Osborn specifically alleged that Verdi acted within the scope of her employment as Executive Director of the defendant LBLA while performing these acts. (*Id.* ¶¶ 24, 26, 37, 38, 44, 45, 52, 53 and 61, App. A 6-7, 9-11, 13-14.) Yet Petitioner in her later court filings characterized the same purported conduct as beyond the scope of Haley's employment. At the least, the Attorney General should be entitled to challenge Petitioner's self-serving re-characterization of these conclusory allegations.

II. Congress' Prohibition of Remand Following Certification is Consistent with Article III.

A. Congress clearly precluded remand by making the Attorney General's certification conclusive only for purposes of removal.

The Westfall Act provides that the Attorney General's certification "shall conclusively establish scope of office or employment for purposes of removal" of the suit from state court. 28 U.S.C. § 2679(d)(2). By making the certification conclusive only for removal, Congress clearly signaled its intent to preclude remand and provide a federal forum to federal employees in such cases, even when a district court finds the Attorney General's determination to be incorrect. Nine justices apparently recognized this in deciding *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995). The majority reasoned that Congress likely omitted the Drivers Act provision authorizing remand, "because it had decided to foreclose needless shuttling of a case from one court to another – a decision evident also in the Westfall Act language making certification 'conclusiv[e] . . . for purposes of removal.'" *Id.* at 434 n.10. Assessing the same provision, the dissent stated: "The Court recognizes that there is nothing equivocal about the Act's provision that once a state tort action has been removed to a federal court after a certification by the Attorney General, it may never be remanded to the state system. . . . " *Id.* at 440 (Souter, J., dissenting). The four-circuit majority of appellate courts addressing the issue agreed, holding that the statute deprives the district court of authority to remand. *See* 6th Cir. Opinion, App. A to Pet. Cert. 10a, *available at Osborn v. Haley*, 422 F.3d 359, 365 (6th Cir. 2005), *cert. granted,* 126 S. Ct. 2017 (2006); *Borneman v. United States*, 213 F.3d 819, 826 (4th Cir. 2000), *cert. denied,* 531

U.S. 1070 (2001); *Garcia v. United States*, 88 F.3d 318, 325 (5th Cir. 1996); *Aliota v. Graham*, 984 F.2d 1350, 1356 (3d Cir.) (Alito, J.), *cert. denied*, 510 U.S. 817 (1993).

B. Congress did not violate Article III by prohibiting remand, since the Attorney General's certification raises the significant federal question of immunity from the outset.

The practical question before the Court, then, is whether Article III of the United States Constitution will allow the Court to give effect to Congress' plain language and intent. The split among the circuits on this question of remand is grounded squarely in Article III concerns. Petitioner cites *Nasuti v. Scannell*, 906 F.2d 802, 814 (1st Cir. 1990), and *Haddon v. United States*, 68 F.3d 1420, 1427 (D.C. Cir. 1995), for the proposition that a district court cannot retain jurisdiction after concluding that the defendant acted outside the scope of his employment. Both courts cited constitutional concerns (although *Nasuti* predates the published ruling in *Lamagno*). *See Haddon*, 68 F.3d at 1427; *Nasuti*, 906 F.2d at 814. Of the four circuits barring remand, only the Fifth Circuit in *Garcia v. United States* directly analyzed the Article III question, essentially adopting the *Lamagno* plurality's rationale in concluding that retaining jurisdiction after rejecting the Attorney General's certification was constitutional. *Garcia v. United States*, 88 F.3d 318, 325 (5th Cir. 1996).

The plurality in *Lamagno* did not view the posed Article III problem as a grave one, reasoning (in paraphrase) as follows: (1) a case that raises a substantive question of federal law at the outset clearly "arises under" federal law within the meaning of Article III, *Lamagno*,

515 U.S. at 435 (citing *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983)); (2) the scope of a federal employee's employment is a significant federal question, and the Westfall Act was designed to assure that it could be aired in a federal forum, *id.*; and (3) considerations of judicial economy and convenience and fairness to litigants make it reasonable and proper to proceed beyond the federal question to final judgment, *id.* At this stage, the court will have invested time and resources on the initial scope-of-employment question, during which it "inevitably will confront facts relevant to the alleged misconduct, matters that bear on the state tort claims against the employee." *Id.* (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966)). As the constitutional question is now squarely before the Court, *see id.* at 437 (O'Connor, J., concurring), the Court should now affirm this portion of the *Lamagno* opinion.

Respondents acknowledge the *Lamagno* dissenters' concern that to use the inevitable intermingling of evidence bearing on both scope of employment and liability to justify retaining jurisdiction is "tantamount to saying the authority to determine whether a court has jurisdiction over the cause of action supplies the very jurisdiction that is subject to challenge." *Id.* at 442 (Souter, J., dissenting). But this view incorrectly characterizes the determination the district court must make. The district courts have no "authority to determine . . . jurisdiction" following the Attorney General's certification. Congress conclusively prohibited them from doing so, via § 2679(d)(2). *See infra* Parts III(B)(1) and (2). Rather, the judicial review recognized by *Lamagno* entails determining whether to override the Attorney General's conclusion, speaking as the federal employer, that its employee was acting within the scope of

his employment. This is the question that becomes "intermingled" with the merits of the underlying claims, and it is a question of federal immunity, not jurisdiction. The involvement of this federal question from the outset does indeed justify Congress' decision to leave jurisdiction with the district court following its resolution. As the *Lamagno* plurality noted, if the plaintiff necessarily relies on federally-created legal relationships, her claim should be treated as one arising under federal law within the meaning of Article III. *Lamagno*, 515 U.S. at 436 (citation omitted). Since Congress further "federalized" the question by involving the United States Attorney General in the scope of employment determination, the matter falls within Congress' unquestioned Article III power to create federal questions by statute, thereby creating federal jurisdiction.

Even the Petitioner agrees that the majority interpretation of § 2679(d)(2) as prohibiting remand is "eminently reasonable" with respect to certifications that are "authorized by the Westfall Act," as this "gives effect to the adverb *conclusively*, and it 'foreclose[s] needless shuttling of a case from one court to another.'" (Petr.'s Br. 38 citing *Lamagno*, 515 U.S. at 433 n.10.) Perhaps this is why Petitioner never requested remand before the court ordered it, asking the court instead to lift the stay on discovery so that the case could move forward against Haley in federal court. (Tendered Order attached to Pl.'s Resp., R. 15.)

C. Questions of law and fact relevant to Haley's immunity created federal jurisdiction over this case from the outset.

Nonetheless, Petitioner now attempts to contrast the present case as involving an "unauthorized" certification

and removal. Thus, Petitioner argues, there was never any dispute for the district court to resolve other than whether the alleged incident did in fact occur, and accordingly, the court never had federal subject matter jurisdiction and was required to remand under 28 U.S.C. § 1447(c) (App. C hereto). As demonstrated above, this is simply not correct. First, there is no such thing as an "unauthorized" certification under the statute. Second, as demonstrated in the Statement of the Case, questions of law were intertwined with the facts relating to the scope of Respondent Haley's employment.

Even if Petitioner were correct, then in deciding solely a factual dispute, the district court would still be deciding whether the incident occurred for the very purpose of determining whether the federal employee acted within the scope of his federal employment. This decides the distinctly federal question of immunity. Again, since scope of employment "sets the line" according to *Lamagno,* 515 U.S. at 423, the key question is not whether the defendant or the Attorney General denied the plaintiff's allegations; it is whether Barry Haley acted within the scope of his employment, and is therefore entitled to immunity. This is a uniquely federal question. Accordingly, the basis for federal jurisdiction was present since the Attorney General's certification, if not from the very moment the allegations were filed. To conclude otherwise would be to accept the unworkable premise that falsely-accused employees are simply not entitled to immunity.

D. Federal jurisdiction was also present from the outset under the federal officer removal statute.

Additionally, the United States preserved a separate basis for federal jurisdiction by requesting removal to federal court under the federal officer removal statute, 28 U.S.C. § 1442 (App. C hereto), as well as the Westfall Act. (Notice of Removal 1-3, R. 1.) As explained in detail above, this Court has already determined that a federal officer need not admit the plaintiff's allegations to secure removal. *Willingham v. Morgan*, 395 U.S. 402, 408 (1969) (citing *Maryland v. Soper*, 270 U.S. 9, 32-33 (1926)). Further, the "color of office" test of § 1442(a) and *Willingham's* required "causal connection" of the allegations to the defendant's official duties are easily met here, where Petitioner's own filings effectively established that her relationship with Haley derived solely from his official duties.

III. The Court of Appeals Had Jurisdiction to Review the District Court's Decisions.

A. The court of appeals enjoyed jurisdiction to review the order of resubstitution under the doctrines established by this Court in *Cohen* and *Waco*.

1. The district court's resubstitution order is reviewable under the collateral order doctrine announced in *Cohen*, as a ruling denying governmental immunity.

Appellate jurisdiction typically arises from a "final and appealable order" of a district court; i.e., appellate review is barred until the trial court finally adjudicates all of the issues presented to it by the litigants. *See* 28 U.S.C.

§ 1291; *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996). An exception to this rule exists, however, for those orders that "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) [are] effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. ___, 126 S. Ct. 952, 958 (2006) (citations omitted). While the Court has stated that these conditions must be applied in a "stringent" manner to avoid upsetting the finality requirement contained in § 1291, *see Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994), certain classes of orders, by their very nature, automatically fall within this so-called "collateral order doctrine."

Among these are orders denying governmental employees the benefits of absolute immunity, *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982), and qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The purpose of the congressionally-established substitution process, as set forth above, is to afford certain federal employees the benefits of governmental immunity. The order entered by the district court overturning the substitution decision of the Attorney General under 28 U.S.C. § 2679(d)(2) and resubstituting Respondent Haley as a party defendant in his individual capacity effectively denied Respondent Haley the protection of governmental immunity under the Federal Tort Claims Act. The resubstitution order of the district court, therefore, falls within the category of cases where immediate, interlocutory appellate review is available under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).[5]

[5] The courts of appeal unanimously agree that a government employee has a right of immediate appeal from an order of resubstitution under the Westfall Act. *See Woodruff v. Covington*, 389 F.3d 1117,

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2. *Will v. Hallock* permits review of the re-substitution order, as a ruling denying governmental immunity.

The recent opinion of this Court in *Will v. Hallock*, 546 U.S. ___, 126 S. Ct. 952 (2006), does not alter the established rubric for immediate appellate review of orders denying governmental immunity. In *Will*, the respondent first brought suit against the United States under the FTCA, alleging negligence by government agents in the search of her home. *See Will*, 126 S. Ct. at 956. The district court dismissed the action, finding it barred under an exception in the FTCA. *Id.* The respondent, during the pendency of the FTCA action, brought a second claim against the officers pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), asserting the agents' conduct violated her rights of due process secured by the Fifth Amendment. Asserting the judgment bar of the FTCA, *see* 28 U.S.C. § 2676, the agents sought dismissal of the *Bivens* claim once the district court entered its order on the initial FTCA claim. *Will*, 126 S. Ct. at 956. The district court denied this request, and the Government appealed. *Id.*

1123-24 (10th Cir. 2004) (citing *Mathis v. Henderson*, 243 F.3d 446, 448 (8th Cir. 2001); *Cuoco v. Moritsugu*, 222 F.3d 99, 105-06 (2d Cir. 2000); *Lyons v. Brown*, 158 F.3d 605, 607 (1st Cir. 1998); *Rodriguez v. Sarabyn*, 129 F.3d 760, 764 (5th Cir. 1997); *Coleman v. United States*, 91 F.3d 820, 823 (6th Cir. 1996); *Flohr v. Mackovjak*, 84 F.3d 386, 390 (11th Cir. 1996); *Melo v. Hafer*, 13 F.3d 736, 741 (3d Cir. 1994); *Kimbro v. Velten*, 30 F.3d 1501, 1503 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995); *Pelletier v. Fed. Home Loan Bank of San Francisco*, 968 F.2d 865, 870 (9th Cir. 1992)) (finding that a resubstitution order falls within the *Cohen* doctrine and that "every circuit court follows" the collateral order doctrine in reviewing such orders).

While the Second Circuit affirmed the court below, this Court ordered reversal for want of jurisdiction in the court of appeals. Finding that the FTCA bar more accurately equated to the common law doctrine of res judicata or claims preclusion than to a denial of governmental immunity, the Court determined that rejection of the FTCA claim bar did not rise to the level of a collateral order under *Cohen*. *See Will*, 126 S. Ct. at 960.

The explanation offered by the Court in *Will* to support this conclusion demonstrates the inapplicability of its holding to the case at bar. The protections for government employees that Congress established in the Westfall Act do not constitute the "avoidance of litigation for its own sake," but rather demonstrate an unequivocal judgment by the legislative branch that employees of the federal government are entitled to absolute immunity for actions performed in the scope of their employment. *Id.* This immunity protection is not "procedural in nature"; rather, it is "timely from the moment" of the certification by the Attorney General. *Id.* It depends not on some prior action involving the same facts and circumstances – indeed, it is not qualified on any precondition at all, as the immunity protection is absolute and immediate. *See Lamagno*, 515 U.S. at 423; *cf. Will*, 126 S. Ct. at 960 (noting that application of the judgment bar is dependent upon the bringing of a prior action under the FTCA and a finding in favor of the Government in the earlier action). The question is not one of procedure, but one of immunity.

Like the purpose of qualified immunity is to encourage governmental employees to act without fear of constitutional liability when an issue of law is unclear, the purpose of the Westfall Act is to encourage governmental employees to carry out their duties without fear of common law tort

liability. *Will*, 126 S. Ct. at 960. In the preamble to the Westfall Act, Congress set forth its express desire to accomplish just this task, stating that "the purpose of this Act [is] to protect Federal employees from personal liability for common law torts committed within the scope of their employment. . . ." Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 2(b) (1988). Quick resolution of the substitution question is therefore "essential" to further the policy which undergirds the immunity scheme established by the Act. *Will*, 126 S. Ct. at 960.[6]

3. The order of resubstitution was reviewable as a separate, precedent order under *Waco*.

Although Respondents contend, *infra*, that the express language of the Act afforded the court of appeals jurisdiction to review both the order of remand and the order of resubstitution, jurisdiction to review the latter also arose from the decision of this Court in *City of Waco v. U.S. Fid. & Guar. Co.*, 293 U.S. 140 (1934). *Waco* arose from a district court's decision dismissing a party's cross-claim and, then determining that the dismissal destroyed

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[6] One can argue, as the Government did in *Will*, that application of the FTCA judgment bar is similarly "essential" to further the immunity policies of that statute. However, such an argument improperly juxtaposes the questions of immunity and judgment. The issue of substitution goes to the heart of the question of immunity: if substitution is proper the employee is immune; if not, there is no immunity. The question of the judgment bar, by contrast, goes to the ultimate question of the effect of a judgment, which can only arise after the question of immunity has been finally answered. Once a judgment has been entered, the congressional policy of affording immunity has already been served, or one would not be discussing an FTCA judgment at all.

the court's diversity jurisdiction, entering an order remanding the action to Texas state court. *See id.* at 141-42. This Court found appellate jurisdiction to review the dismissal of the cross-claim, notwithstanding the bar of the then in effect version of 28 U.S.C. § 1447, on grounds that the "decree of dismissal preceded that of remand" and would be conclusive on the parties upon their return to state court. *Id.* at 143. The Court "disaggregated" the two orders and proceeded to direct review of the initial dismissal. *See Kircher v. Putnam Funds Trust*, 547 U.S. ___, 126 S. Ct. 2145, 2156 n.13 (2006).

Similar reasoning applies to the current claim. The issue of resubstitution is "separate from and logically precedes the question of remand" and can be reviewed without effect upon the remand order.[7] *Aliota v. Graham*, 984 F.2d 1350, 1353 (3d Cir.) (Alito, J.) (citations omitted), *cert. denied*, 510 U.S. 817 (1993). The remand discussion contained in the district court opinion reveals that the decision to order remand was contingent upon a prior finding of resubstitution. (*See* D. Ct. Mem. & Order, App. D to Pet. Cert. 24a ("Having concluded that the United States is not a proper party to this case, this Court must now determine [the question of remand]".).) This decision thus fits squarely within the *Waco* rationale, and jurisdiction for review of the resubstitution order is available pursuant to the procedure contained in that opinion.[8]

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[7] Assuming, of course, that the district court possessed the necessary statutory authority to order the remand. *Cf. infra* Part III(B).

[8] Similarly to the application of the collateral order doctrine, the courts of appeal agree that *Waco* permits review of the resubstitution order. *See Coleman v. United States*, 91 F.3d 820, 823 (6th Cir. 1996); *Flohr v. Mackovjak*, 84 F.3d 386, 389-90 (11th Cir. 1996); *Hanna v.*

(Continued on following page)

4. *Kircher* permits review of the resubstitution order under *Waco*, because the order did not resolve the entire action.

In the *Kircher* opinion, the Court addressed an argument by the respondent mutual funds that review was available for the decision in that matter pursuant to *Waco*. The Court, in addressing this argument, noted "[w]ithout passing on the continued vitality of that case [*Waco*] in light of § 1447(d), we note that on its own terms it is distinguishable." *Kircher*, 547 U.S. ___, 126 S. Ct. at 2156 n.13. The Court concluded that, because the "remand order here cannot be disaggregated as the *Waco* orders could," the *Waco* rule did not permit review. *Id.*

First, nothing contained in the current version of 28 U.S.C. § 1447(d) undermines the rule set forth in *Waco*. The version of the remand review statute in effect at that time, 28 U.S.C. §§ 71 and 80, contained a materially-identical bar to reviewing remand orders. *See Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 349-50 (1976) ("Sections 1447(c) and (d) represent the . . . recodification of §§ 71 and 80. They were intended to restate the prior law with respect to remand orders and their reviewability."). As this Court explained in *Thermtron*, "[n]o changes of law or policy are to be presumed from changes to the language in the 1948 revision of the Judicial Code unless an intent to make such changes is clearly expressed." *Id.*

Naegele, 72 F.3d 137 (unpublished table opinion), 1995 WL 723597 (10th Cir. 1995); *Kimbro v. Velten*, 30 F.3d 1501, 1503 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995); *Jamison v. Wiley*, 14 F.3d 222, 233 (4th Cir. 1994); *Aliota v. Graham*, 984 F.2d 1350 (3d Cir.) (Alito, J.), *cert. denied*, 510 U.S. 817 (1993); *Mitchell v. Carlson*, 896 F.2d 128, 132 (5th Cir. 1990).

at 350 n.15 (citation omitted). Because the text of the current version of § 1447(d) contains no "clear expression" of a change in law from the remand review statutes in effect at the time of *Waco*, the rubric set forth in that opinion remains unaltered in evaluating review of the resubstitution order in the case at bar.

Second, *Waco*, unlike *Kircher*, is not distinguishable here on its facts. The discussion in *Kircher* arose out of the peculiar statutory mechanism contained in the Securities Litigation Uniform Standards Act ("SLUSA"), 15 U.S.C. § 77p. The SLUSA statute provides not for a mechanism of continued adjudication, but one of dismissal; i.e, if the preclusion provision contained in the statute applies, the case is automatically dismissed in its entirety. *See Kircher*, 126 S. Ct. at 2155 ("If the action is precluded, neither the District Court nor the state court may entertain it, and the proper course is to dismiss."). Here, upon resubstitution of Respondent Haley as a party defendant, there was something to return to state court – a bevy of state law employment-related torts against the Respondents. *See Mitchell v. Carlson*, 896 F.2d 128, 133 (5th Cir. 1990) (noting that by ordering resubstitution of the individual defendant, a case exists for return to state court).

Further, in the case at bar, regardless of the FTCA protection extended to Respondent Haley, the FTCA will not bar continued action against Respondent Verdi. A Kentucky state court judge could exercise his or her discretion afforded under Ky. R. Civ. P. 21 and sever the two claims, leaving an administrative action under the FTCA and a state court claim proceeding against Respondent Verdi. Unlike in *Kircher*, therefore, something did exist "to remand to state court" following entry of the resubstitution order. *Kircher*, 126 S. Ct. 2156 n.13.

B. Section 1447(d) presents no bar to review of the remand order.

1. Section 1447(d) bars review only of remand orders invoking grounds within the district court's authority to consider under Section 1447(c).

The statutory language contained in § 1447(d), while ostensibly absolute in its bar of appellate review, must be construed in light of the language contained in § 1447(c). *See Thermtron*, 423 U.S. at 345-46 ("These provisions, like their predecessors, are in pari materia and are to be construed accordingly rather than as distinct enactments." (quotation and citation omitted)). This Court thus held in *Thermtron* that "only remand orders issued under § 1447(c) and invoking the grounds specified therein that removal was improvident and without jurisdiction are immune from review under § 1447(d)." *Id.* at 346. Applying this rule, the Court concluded in *Thermtron* that the Sixth Circuit possessed appellate jurisdiction to review a remand decision based upon an overcrowded district court docket. The Court found that the provision contained in § 1447(d) did not insulate from review district court remands based on "grounds that seem justifiable to them but which are not recognized by the controlling statute." *Id.* at 351.

> That justice may move more slowly in some federal courts than in their state counterparts is not one of the considerations that Congress has permitted the district courts to recognize in passing on remand issues. Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the

> writ of mandamus [overturning the remand] was not barred by § 1447(d).

Id.[9]

2. Section 2679(d)(2) barred the District Court from directing remand in this action, and accordingly there were no grounds it had authority to consider under § 1447(c).

In the case at bar, as in *Thermtron*, the district court "exceeded his statutorily defined power" in ordering remand. *Thermtron*, 423 U.S. at 351. Section 2679(d)(2) expressly states that the certification by the Attorney General "shall conclusively establish the scope of office or employment for purposes of removal." 28 U.S.C. § 2679(d)(2). While the district court enjoyed the ability to review the scope of employment question under *Lamagno*, "his statutorily defined power" did not grant to him the ability to order a remand.

> Congress, by expressly stating that the Attorney General's certification is "conclusive" as to jurisdiction, has prohibited a district court from using its disagreement with the Attorney General's scope of employment certification to deny jurisdiction and

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[9] The Court subsequently recognized another circumstance that fits within the *Thermtron* rule construing the statutory authority of district courts and its impact upon appellate review. In *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), the Court held that remand based upon application of the abstention doctrine established by *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) was not a remand order described in § 1447(c), and therefore appellate review was available. *See Quackenbush*, 517 U.S. at 712.

> so send the case back to state court where it originated.

Aliota, 984 F.2d at 1357. The court could not legitimately invoke the grounds specified in § 1447(c), that "removal was improvident and without jurisdiction," when Congress had issued a blanket statement conclusively establishing removal jurisdiction.[10]

Thus, the question is not whether there was "plain . . . legal error in ordering the remand," for which appellate review is unavailable. *See Kircher*, 126 S. Ct. at 2154 (citations omitted). The question is whether the district court had authority to remand at all. Congress' express creation of non-discretionary, exclusive federal jurisdiction for matters under § 2679(d)(2) simply afforded the district

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[10] Revisions to § 1447(c) enacted by Congress subsequent to the decision in *Thermtron* do not alter its directive that actions taken by a district court without statutory authority are not immune from appellate review. Moreover, it is clear from a review of the legislative history to these revisions that Congress sought only to impose a thirty day time limit on filing motions to remand based upon defects other than a lack of subject matter jurisdiction, not to alter the existing understanding of appellate review of remand orders. *See* H.R. Rep. No. 104-799, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3417, 3418 ("The intent of this amendment was to impose a 30-day limit on all motions to remand except in those cases where the court lacks subject matter jurisdiction."). The statutory history reveals the language that in 1976 (at the time of *Thermtron*) read "improvidently," became in 1988 "defect in removal procedure," and in 1996 became "any defect other than subject matter jurisdiction," is consistently designed to cover defects that occur at the time of removal other than subject matter jurisdiction. Here, no "defect" existed at the time of removal due to the statutory language contained in § 2679(d)(2), placing the district court's remand order outside those covered by § 1447(c) under any of its modern statutory phrasings.

court no statutory authority to order remand of this "properly removed" action. *Thermtron*, 423 U.S. at 351.[11]

Allowing district courts to override Congress' statutory directive with impunity would render the language of § 2679(d)(2) null and void. Enforcing this provision, by contrast, does no injury to § 1447, which merely protects the district courts' discretion to remand in cases in which removal jurisdiction is at issue. Subject to constitutional boundaries which are not reached here (*see* Part II(A), *supra*), Section 2679(d)(2) foreclosed any issue of removal jurisdiction or remand in Westfall Act cases in which the Attorney General has certified scope of employment. This is the "clear statutory command" the Court recognized as an exception to the presumption that Congress "is aware of the universality of th[e] practice of denying appellate review of remand orders when Congress creates a new ground for removal." *See Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995) (citations omitted). Unlike the bankruptcy removal/remand statute the Court analyzed in *Things Remembered* and the SLUSA removal provision addressed in *Kircher*, § 2679(d)(2) "cannot comfortably coexist" with § 1447 under the interpretation

[11] District courts, like all inferior federal courts, are creatures of statute, there being no express provision in the Constitution for the creation of such courts without congressional action. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. ___, 125 S. Ct. 2611, 2616-17 (2005) ("The district courts of the United States, as we have said many times, are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute." (quotation and citation omitted)). Congress has the power to invest district courts with "jurisdiction, either limited, concurrent or exclusive, and of withholding jurisdiction from them in the exact degrees and character which Congress may deem proper for the public good." *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845).

Petitioner proposes. *Id.*; *see also Kircher*, 126 S. Ct. at 2153 n.8.

Contrary to Petitioner's argument, the district court lacked any authority to conclude it "had no original jurisdiction over this case," as Congress expressly provided for such jurisdiction. (Petr.'s Br. 12 (quoting *Int'l Primate Protection League v. Admins. of Tulane Educ. Fund*, 500 U.S. 72, 87 (1991)).) Indeed, in *Lamagno*, all nine members of the Court recognized that Congress intended the language in question to remove from the district court the authority to evaluate the propriety of removal, and thus, remand. *See supra* Part II(A).[12]

No constitutional prohibitions exist to prevent the exercise of the clear statutory language set forth by Congress, and the lack of authority for the district court's action in this situation is clear. Therefore, the remand order did not fall within the ambit of § 1447(c), and was properly subject to review by the court of appeals and now this Court.

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[12] Denying effect to the "conclusively . . . for removal" wording of the statute would threaten the very analytical foundation of *Lamagno*: if the majority had not interpreted the phrase to preclude remand, then its discussion of potential Article III problems would have been moot, along with the dissent. The alternative interpretation, that the Attorney General's certification is conclusive for all purposes, would preclude judicial review of the certification. Had *Lamagno* so held, then the U.S. Attorney's certification that Haley acted within the scope of his employment would control, and the case would remain in district court with the United States as a party. Under either interpretation, Haley would be entitled to defend the action in a federal forum. If the word "conclusively" is given any effect in the statute, the question of remand should never arise.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

28 U.S.C.A. § 2679

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government –

> **(A)** which is brought for a violation of the Constitution of the United States, or
>
> **(B)** which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of

the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States

shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a

claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if –

> **(A)** the claim would have been timely had it been filed on the date the underlying civil action was commenced, and
>
> **(B)** the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

APPENDIX B

28 U.S.C.A. § 1447

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

APPENDIX C

28 U.S.C.A. § 1442

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

> **(1)** The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
>
> **(2)** A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.
>
> **(3)** Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;
>
> **(4)** Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the

district court of the United States for the district and division in which the defendant was served with process.

APPENDIX D

28 C.F.R. § 15.3 Agency report.

(a) The Federal employee's employing Federal agency shall submit a report to the United States Attorney for the district embracing the place where the civil action or proceeding is brought fully addressing whether the employee was acting within the scope of his office or employment with the Federal Government at the time of the incident out of which the suit arose, and a copy of the report shall be sent by the employing Federal agency to the responsible Branch Director of the Torts Branch, Civil Division, Department of Justice.

(b) The appropriate Federal agency shall submit a report to the United States Attorney for the district embracing the place where the civil action or proceeding is brought fully addressing whether the person was acting as a covered person at the time of the incident out of which the suit arose, and a copy of the report shall be sent by the appropriate Federal agency to the responsible Branch Director of the Torts Branch, Civil Division, Department of Justice.

(c) A report under this section shall be submitted at the earliest possible date, or within such time as shall be fixed upon request by the United States Attorney or the responsible Branch Director of the Torts Branch.

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28 C.F.R. § 15.4 Removal and defense of suits.

(a) The United States Attorney for the district where the civil action or proceeding is brought, or any Director of the Torts Branch, Civil Division, Department of Justice, is authorized to make the statutory certification that the

Federal employee was acting within the scope of his office or employment with the Federal Government at the time of the incident out of which the suit arose.

(b) The United States Attorney for the district where the civil action or proceeding is brought, or any Director of the Torts Branch, Civil Division, Department of Justice, is authorized to make the statutory certification that the covered person was acting at the time of the incident out of which the suit arose under circumstances in which Congress has provided by statute that the remedy provided by the Federal Tort Claims Act is made the exclusive remedy.

(c) A certification under this section may be withdrawn if a further evaluation of the relevant facts or the consideration of new or additional evidence calls for such action. The making, withholding, or withdrawing of certifications, and the removal and defense of, or refusal to remove or defend, such civil actions or proceedings shall be subject to the instructions and supervision of the Assistant Attorney General in charge of the Civil Division or his or her designee.

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No. 05-593

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SUPREME COURT, U.S.

In the Supreme Court of the United States

PAT OSBORN

Petitioner

v.

BARRY HALEY; GAYE LUBER; AND
LAND BETWEEN THE LAKES ASSOCIATION, INC.

Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

When a federal employee is sued in a civil action in a state court, the Westfall Act, 28 U.S.C. § 2679(d)(2), authorizes the Attorney General to remove the action to federal district court—and seek to substitute the United States as the party defendant in place of the employee—by certifying that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." The petition presented the following two questions about the Act:

1. Whether the Westfall Act authorizes the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident solely by denying that such incident occurred at all.

2. Whether the Westfall Act forbids a district court to remand an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Act.

In granting the petition, the Court directed the parties to brief and argue the following additional question:

3. Whether the court of appeals had jurisdiction to review the district court's remand order, notwithstanding 28 U.S.C. § 1447(d).

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

As in petitioner's opening brief ("Pet. Br."), we address first the jurisdictional question posed by the Court, followed by the two merits questions presented by the petition.

I. The Court of Appeals Lacked Jurisdiction.

As an initial matter, the Government argues that the "district court's substitution ruling and its remand order are reviewable under the collateral order doctrine or by way of mandamus." Brief for Respondent Barry Haley ("Haley Br.") at 13 (section heading). Petitioner agrees that, *if* 28 U.S.C. § 1447(d) did not deprive the court of appeals of jurisdiction, then neither lack of finality nor the limitations of mandamus would stand in the way of appellate review. But as explained before, *see* Pet. Br. at 10-18, and as amplified below, the Sixth Circuit lacked jurisdiction under the plain terms of § 1447(d), which (when it applies) bars review "on appeal or otherwise."

1. The Government asserts that § 1447(d) does not apply here because "[o]nly remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." Haley Br. at 17 (quoting *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995)). Having quoted very similar language in her own brief, petitioner agrees with this general point. *See* Pet. Br. at 10 ("the bar of § 1447(d) applies only to remands based on the grounds specified in § 1447(c)" (quoting *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2153 (2006))). Of course, petitioner has also explained at length why the remand order here was indeed based on one or both of the grounds specified in § 1447(c), namely, "lack of subject matter jurisdiction or a "defect other than lack of subject matter jurisdiction." To summarize:

- The district court issued its remand order on the belief that it "ha[d] no jurisdiction over this case"; similarly, the court of appeals understood that the district court had "conclud[ed] that it lacked jurisdiction." Pet. Br. at 11 (quoting Pet. App. 25a, 4a).
- The district court essentially concluded that removal was improper because the Attorney General "lacked authority" to remove the action to federal court based on an incident-denying certification, *id.* at 12, and "a finding that removal was improper [for lack of authority to remove] deprive[d] that court of subject matter jurisdiction and obliges a remand under the terms of § 1447(c)," *id.* (quoting *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 87 (1991)).
- Alternatively, the district court's same "belief that the removal was 'not authorized by law'" made the court's remand order one based on a "defect" within the meaning of § 1447(c). *Id.* at 13 (quoting *Cook v. Wikler*, 320 F.3d 431, 439 (3d Cir. 2003)).

How does the Government respond to the foregoing explanation? Not by contradicting it, but rather by advancing the principle that § 1447(c) is "limited to remand orders for a lack of subject matter jurisdiction *at the time of removal*." Haley Br. at 18 (emphasis added). The Government then asserts (without any citation to the record) that the remand order here "was not based on a lack of subject matter jurisdiction at the time of removal, and so does not come within Section 1447(c)." *Id.* at 19. The record shows otherwise.

Although it did take some time (as all litigation takes time), the district court in the end concluded that the Attorney General had issued (and had predicated removal upon) a "Westfall Act certification[] based on an argument that no harm-causing incident ever took place." Pet. App. 14a. The court also concluded that in issuing this incident-denying certification (and in removing the case on such basis), the Attorney General had attempted to do exactly what he was

not "permitt[ed]" to do, thereby obliging a remand for lack of jurisdiction. *Id.*; *see also* Pet. Br. at 6-7, 12-13. Neither the certification itself, nor any of the facts on which it was based or challenged, post-dated removal. In other words, all of the jurisdictional considerations on which the district court based its remand order were, to use the Government's term, "fixed" *at the time of removal*. Haley Br. at 18.

That leaves the Government's assertion that "[u]nder the express terms of Section 2679(d)(2), the Attorney General's certification conferred subject matter jurisdiction on the district court at the time of removal." Haley Br. at 19-20. On the merits, of course, that point is in dispute. *See* Pet. Br. at 34-41; *infra* pp. 18-19. But for present purposes, the crucial point is that § 1447(d) renders unreviewable the district court's contrary interpretation of § 2679(d)(2)—*even if that interpretation was wrong*. As the Court recently emphasized, where a district court remands a case based on a perceived lack of subject matter jurisdiction, appellate "review is unavailable no matter how plain the legal error in ordering the remand." *Kircher*, 126 S. Ct. at 2154.

2. The Government next argues that § 2679(d)(2) is what the Court in *Kircher* called a "statutory exception" to the bar of § 1447(d). 126 S. Ct. at 2153. That is, because "Congress made clear that cases removed by the Attorney General under that mandatory provision of the Westfall Act are not subject to remand *at all*," Congress "could hardly have intended to render such an order, if nonetheless entered, unreviewable by virtue of Section 1447(d)." Haley Br. at 20. Both parts of this argument are wrong.

As for the premise, it is obvious that at least *some* actions removed by the Attorney General purportedly under the Westfall Act are subject to remand. Section 2679(d)(2) provides that upon a particular kind of certification, "any *civil* action or proceeding commenced upon such claim in a *State court* shall be removed without bond at any time *before* trial by the Attorney General" to federal district court (emphasis added). In the face of this language, can it really

be thought that a removed *criminal* proceeding is "not subject to remand *at all*"? What about an action removed from a *tribal* court or a state *administrative body*? Or an action removed *after* trial has commenced? Are these "not subject to remand *at all*"?

Obviously, all of these cases *are* "subject to remand." Therefore, the Westfall Act is actually a statute that allows removal (and forecloses remand) in some circumstances but precludes removal (and compels remand) in others. In this respect, of course, the Act is similar to every other removal statute. Determining in any given case whether the applicable removal statute forecloses or compels remand might pose a difficult question, but it is surely a question that district courts confront routinely. When those courts answer that question in favor of remand (as did the district court here), § 1447(d) insulates the answer from appellate review, even if (as reiterated above) the answer is "wrong."

As for the Government's conclusion, it does not follow even if the premise is granted. *Kircher* made it clear that an extrinsic exception to the bar of § 1447(d) cannot rest on so flimsy a construct as what Congress "could hardly have intended." Instead, any such exception must be grounded in a "'clear statutory command'" by which Congress can be said to have "expressly made 28 U.S.C. § 1447(d) inapplicable to particular remand orders." 126 S. Ct. at 2153 n.8 (quoting *Things Remembered*, 515 U.S. at 128). Though we agree with the Government that Congress need not "cross-referenc[e]" § 1447(d) in explicit terms, Haley Br. at 20, the very statute cited by the Government as exemplary highlights that the Westfall Act lacks the "clear statutory command" necessary to except it from § 1447(d)'s purview. The cited statute authorizes the Resolution Trust Corporation to "appeal any order of remand entered by a United States district court." 12 U.S.C. § 1441a(*l*)(3)(C), *quoted in* Haley Br. at 20. The clear and express references to *appeal* and *remand* contrast starkly with the absence of such terms in § 2679(d)(2). As in *Kircher*, "that silence tells us we must

look to 28 U.S.C. § 1447(d) to determine the reviewability of remand orders under the Act." 126 S. Ct. at 2153 n.8.[1]

3. The Government then turns to *Kircher*, if only to try to distinguish the removal provision at issue there, 15 U.S.C. § 77p(c), from the one at issue here. *See* Haley Br. at 21-23. Assertedly, the teachings of *Kircher* have no applicability here because "[r]emoval under the Westfall Act is fundamentally different in two critical respects." *Id.* at 22.

First, the Government asserts that unlike the statute considered in *Kircher*, the Westfall Act "mandates a federal forum for determination of the critical scope-of-employment question on the merits of the case." *Id.* On the merits of *this* case, petitioner disputes that an incident-denying certification even raises a true scope-of-employment question. *See* Pet Br. at 24-26. For present purposes, the more important point is any judicial determination concerning the circumstances in which the Westfall Act mandates a federal forum is necessarily a *jurisdictional* determination under a federal removal statute. Again, when that determination yields a remand, it "is immunized from all forms of appellate review" by § 1447(d). *Kircher*, 126 S. Ct. at 2153.

Second, the Government observes that while removal jurisdiction in *Kircher* "depend[ed] entirely on the defendants having a successful defense," such jurisdiction under the Westfall Act is secured "even if the district court later overturns the scope-of-employment determination and resubstitutes the employee as defendant." Haley Br. at 22. But as explained above, the district court did not "overturn" the Attorney General's scope-of-employment determination in this case; rather, the court concluded—right or wrongly, it matters not for purposes of § 1447(d)—that in making an incident-denying certification, the Attorney General tried to

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[1] In this context, the Government relies on *Aliota v. Graham*, 984 F.2d 1350, 1356 (3d Cir.), *cert. denied*, 510 U.S. 817 (1993). *See* Haley Br. at 20-21. We have already addressed why *Aliota* is not convincing on this point. *See* Pet. Br. 14-16.

do what the Westfall Act did not permit him to do. As for the Government's invocation of the federal officer removal statute, *see id.* at 23, we have already explained how that statute buttresses the district court's decision to remand. *See* Pet. Br. at 40-41; *see also Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1250 & n.1 (9th Cir. 2006) (applying the bar of § 1447(d) to a case removed under § 1442(a)(1)).

4. The Government next calls attention to the "consequences" and "ramifications" that would flow from a ruling by this Court that the district court's remand order is immunized from appellate review by § 1447(d). *See* Haley Br. at 22-23. They are basically two: (1) respondent Haley could not avail himself of the right conferred by *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985), to an immediate appeal of the trial court's denial of his claim of official immunity; and (2) he would be compelled to defend against petitioner's state-law tort claims in state court, with federal-court consideration of his federal defenses confined to "review in this Court from an adverse state-court decision." *Id.* at 23. But these considerations are not sufficient to overcome the long-standing "policy of Congress [that] opposes 'interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.'" *Kircher*, 126 S. Ct. at 2152 (quoting *United States v. Rice*, 327 U.S. 742, 751 (1946)).

First, as the Court made clear in *Johnson v. Fankell*, 520 U.S. 911, 916-17 (1997), "*Mitchell* was an application of the 'collateral order' doctrine," and it "construe[d] the federal statutory language of 28 U.S.C. § 1291." Thus, the "right to have the trial court rule on the merits of [an] immunity defense . . . has its source in [federal substantive law], but the right to immediate appellate review of that ruling in a federal case has its source in § 1291," making it a "federal procedural right." *Id.* at 921. As such, the right to immediate appellate review is quintessentially subject to limitation by Congress. Section 1447(d) is just such a limitation.

Moreover, while it is fair to call attention to "the Westfall Act's goal of shielding federal employees from . . . the threat of protracted personal tort litigation," Haley Br. at 24, *Johnson v. Fankell* has already rejected the contention that "officials' interest in avoiding the burdens of litigation" trumps all competing considerations. 520 U.S. at 922. One of those "countervailing considerations" that will overcome the right to immediate appeal is the "appropriate interpretation of § 1291" and the policies underlying its final judgment rule. *Id.* (discussing *Johnson v. Jones*, 515 U.S. 304 (1995)). There is no reason to believe that the appropriate interpretation of § 1447(d) and the policies underlying its similarly ancient bar of appellate review of remand orders are any less important. *Cf. Rice*, 327 U.S. at 749.

Second, the Court has also rejected the notion that the possibility of defendants' being "wrongly" forced to litigate in a state court, with federal review limited to the exercise of this Court's certiorari jurisdiction, is any cause to abandon the bar of § 1447(d). Thus, *Kircher* acknowledged that the hardship to the defendants resulting from the remands in that litigation was "made acute by our recent decision in *Dabit*, which expressly disavows the district court's limited view of the scope of" the governing substantive statute. 126 S. Ct. at 2156 (referring to *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 126 S. Ct. 1503 (2006)). But that hardship, acute though it may have been, did not justify departing from § 1447(d), for the defendants were able to "argue the significance of *Dabit* and ask for dismissal on grounds of preclusion *when they return to the state court*," and "any claim of error on that point can be considered on review by this Court." *Id.* at 2156-57 (emphasis added). If hardship to defendants in general does not justify making an exception to § 1447(d), neither does hardship to *the Government* in particular. The Court put it this way in *Rice*:

> It may be arguable, as a matter of policy, that in giving the Government the right to intervene and remove a cause from a state court, it should also

> have been given the right, not allowed to private litigants, to have orders of remand reviewed in the appellate courts. But the Congressional policy of avoiding interruption of the litigation of the merits of removed causes, properly begun in state courts, is as pertinent to those removed by the United States as by any other suitor . . . .

327 U.S. at 752.[2]

In sum, that a citizen of Kentucky should answer in a Kentucky court for actions concededly undertaken *outside* the scope of his federal employment (if they occurred at all) is hardly "problematic." Haley Br. at 24. It is instead the norm in "a system of federalism in which the state courts share responsibility for the application and enforcement of federal law." *Johnson v. Fankell*, 520 U.S. at 922.

5. Finally, the Government invokes *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140 (1934). *See* Haley Br. at 25-27. We have briefed this issue before, *see* Pet. Br. at 16-18, and will not labor it here. We would add only that the applicability of *Waco* turns, as so much in this case turns, on a correct understanding of the district court's

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[2] In this context, we are at loss to understand the Government's statement that, if the remand order were reinstated, the "United States would be forced to subject itself and its employees to the jurisdiction of the state courts and seek to vindicate the Attorney General's certification there." Haley Br. at 24. With respect to the United States as a party, it was not named as a defendant in petitioner's state-law complaint, and it did not otherwise appear in the state-court action. The whole point of petitioner's efforts in federal court has been to keep the United States *out of* the case.

With respect to the United States as a provider of legal representation to federal employees, Department of Justice regulations have long contemplated that in some circumstances, an employee "may be provided representation in civil, criminal and Congressional proceedings in which he is sued, subpoenaed, or charged in his individual capacity." 28 C.F.R. § 50.15(a). These proceedings expressly include those in state courts. *See, e.g., id.* § 50.15(a)(7).

work. If, as the Government asserts, *see, e.g*, Haley Br. at 28 n.8, the district court merely undertook a conventional "review" of the Attorney General's certification of the kind at issue in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), then the court's order rejecting the certification and its order effecting remand can be "disaggregated," *Kircher*, 126 S. Ct. at 2156 n.13, and reviewed separately. But if, as petitioner has demonstrated, the district court rejected the incident-denying certification in this case because the court concluded (rightly or wrongly) that the Attorney General lacked authority issue it—that is, the certification was not "erroneous" but was instead unauthorized by the Westfall Act—the court's orders were "inextricably linked" to one another, *Aliota*, 984 F.2d at 1353, and *Waco* is inapplicable.

Accordingly, 28 U.S.C. § 1447(d) deprived the court of appeals of jurisdiction to review the district court's remand order, and the judgment of the court of appeals should be vacated for lack of jurisdiction.

II. The Attorney General Lacks Authority to Issue "Incident-Denying" Certifications.

The Government devotes Part II of its brief to arguing that "the Attorney General need not accept the truth of the plaintiff's allegations in making a scope-of-employment certification." Haley Br. at 28 (section heading). As a result, the Government's argument is focused almost exclusively on the *factfinding* authority of the Attorney General and of the district courts in Westfall Act cases. For example:

- "the Attorney General's scope-of-employment certification under the Westfall Act may . . . rest upon the resolution of disputed facts," *id.* at 28;
- "a federal employee is entitled to a federal forum . . . to resolve any disputed facts" regarding his claim of official immunity, *id.* at 29 (section heading);
- Haley is entitled "to a resolution by the district court of any disputed facts relating to his immunity defense," *id.* at 31;

- "nothing in th[e] language [of § 2679(d)] requires the Attorney General to accept the truth of the plaintiff's allegations regarding the 'incident' that gave rise to her claim or the federal official's connection with it," *id.* at 33;
- "the question whether the employee was acting within the scope of his employment can usually be made as a matter of law, but will occasionally require limited discovery and the determination of facts," *id.* at 35;
- "Haley was . . . entitled to a federal forum to determine the facts relating to his defense of federal officer immunity," *id.* at 39.

With all due respect to the Government, these contentions and their supporting argument have little connection with the question presented. That question is not whether the Attorney General or the district court can "resolve disputed facts" or whether a federal employee is "entitled to a federal forum" to determine his immunity defense. Rather, the question presented is

> Whether the Westfall Act authorizes the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident solely by denying that such incident occurred at all.

Supra p. i. As set out below, the Government's brief simply does not answer this question. By contrast, petitioner has demonstrated that the correct answer is "no."

1. The Government argues that Haley is entitled "to a resolution by the district court of any disputed facts *relating to his immunity defense*," *id.* at 31 (emphasis added), or to say the same thing, he is "entitled to a federal forum to determine the facts *relating to his defense of federal officer immunity*," *id.* at 39 (emphasis added). We generally agree with these principles, but the emphasized phrases are the key to understanding why incident-denying certifications are not encompassed by the identified entitlements.

As explained previously, *see generally* Pet. Br. at 23, the Westfall Act establishes a powerful yet limited immunity for federal employees sued in civil actions. That is, the Act grants "absolute immunity for Government employees . . . for torts committed by [them] *in the scope of their employment*"—and not otherwise. *United States v. Smith*, 499 U.S. 160, 163 (1991) (emphasis added); *accord* Haley Br. at 2 (observing that the Act "confers a statutory immunity on federal employees for acts *within the scope of their employment*" (emphasis added)). Indeed, this Court has observed that Congress "wanted the employee's personal immunity to turn on that question alone." *Lamagno*, 515 U.S. at 426.

These precepts mean that any "immunity defense" to be asserted by a federal employee under the Westfall Act is necessarily a defense that the employee was acting "within the scope of his employment." Not surprisingly, this is just what the Attorney General must certify in order properly to invoke the Westfall Act and remove a case to federal court: "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." § 2679(d)(2). By contrast, a defense of "I didn't do it" or "it never happened" is not an *immunity* defense, for it does not implicate *scope of employment*. *See* Pet. Br. at 29-30 (citing cases that illustrate the distinction between immunity and other kinds of legal defenses). Correspondingly, the Westfall Act does *not* authorize the Attorney General to certify "that the defendant employee did not participate in the incident out of which the claim arose" or to remove a case on that basis.

But "I didn't do it" or "it never happened" is precisely the defense that is invoked by an incident-denying certification. As the court of appeals perceived, such a certification "amounts to a denial that any wrongdoing occurred," Pet. App. 4a, and resolution of the defense is "accomplished by deciding whether the employee committed the wrong the plaintiff alleges," Pet. App. 5a. As illustrated by numerous cases, *see* Pet. Br. at 23-26, deciding "whether the alleged

harm-causing incident occurred *at all*," Pet. App. 3a-4a (emphasis added), is crucially different from deciding whether the incident occurred "*within* the scope of [an employee's] office or employment," § 2679(d)(2) (emphasis added).

In sum, the Westfall Act entitles a federal employee to a federal forum to determine his *immunity* defense (including factual questions pertinent thereto). But the Act does not entitle a federal employee to a federal forum to assert *every conceivable* defense, like a defense that "amounts to a denial that any wrongdoing occurred." Pet. App. 4a. When he purports (as in this case) to remove an action to federal court to litigate such a defense, the Attorney General oversteps the authority granted him by the Westfall Act.

2. *Willingham v. Morgan*, 395 U.S. 402 (1969), is not to the contrary. The first part of *Willingham* concerned the standards for removal pursuant to 28 U.S.C. § 1442(a)(1). The Court ruled that the statute "is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." 395 U.S. at 406-07. The point of the statute is "to have the validity of the defense of official immunity tried in a federal court." *Id.* at 407. This ruling accords perfectly with the analysis set forth above: removal is authorized where a defendant can raise not just *any* colorable defense but rather a colorable defense "arising out of [his] duty to enforce federal law."

The second part of *Willingham* concerned the standards for determining whether a lawsuit "grows out of conduct under color of office, and . . . is, therefore, removable." *Id.* Observing that its cases have interpreted the 'color of office' test to require a showing of a 'causal connection' between the charged conduct and asserted official authority," the Court ruled that the defendants "had demonstrated the required 'causal connection' " by virtue of "the undisputed fact that [they] were on duty, at their place of federal employment, at all the relevant times." *Id.* at 409. Finally — and here is where the Government repeatedly draws attention, *see* Haley Br. at 30, 32, 39, 41—the Court ruled:

> If the question raised is whether [the defendants] were engaged in some kind of "frolic of their own" in relation to [the plaintiff], then they should have the opportunity to present their version of the facts to a federal, not a state, court. This is exactly what the removal statute was designed to accomplish. [The defendants] sufficiently put in issue the questions of official justification and immunity; the validity of their defenses should be determined in the federal courts.

395 U.S. at 409. The reasonable import of this passage is that *when* federal employees "sufficiently put in issue the [defenses] of official justification and immunity," they are entitled to determination of those defenses in federal court, and that determination may include a court's deciding between competing versions of the facts. This passage is not, however, warrant for some free-floating right on the part of federal employees to "tell their story" to a federal court, especially if that story is not about official immunity.

3. Much of the Government's argument is premised on the notion that this case does not, after all, involve an incident-denying certification and, concomitantly, that the case presents disputed issues of fact that truly bear on the scope of respondent Haley's federal employment. Instead of a binary choice between two versions of the facts—Haley "had nothing to do with petitioner['s] being fired" (his version), versus he did "bring about petitioner's firing through actions that were outside the scope of his employment" (her version)—the Government now proffers a third alternative: "Haley did have some connection to petitioner's dismissal, but his actions were intended to further the interests of the Forest Service . . . and were therefore within the scope of his employment." Haley Br. at 37. This Court should reject the Government's attempt to rewrite the record as understood by both courts below and to relitigate this case from scratch.

First, as to whether there is some undeveloped factual issue that could turn this into a true scope-of-employment

case, the district court understood the Government to argue that Haley had no "connection" whatsoever to petitioner's dismissal, given Haley's "declaration stating that he had no communication with [respondent Luber] regarding the decision to fire [petitioner]." Pet. App. 13a-14a.[3] Though the district court was willing to entertain alternative legal arguments, it reasonably refused to credit "factual arguments made in the alternative when one version is made under oath subject to perjury, *i.e.*, Mr. Haley's declaration, and the other version merely suggested." Pet. App. 14a. Haley was indeed allowed to "present [his] version of the facts to a federal . . . court." Haley Br. at 39 (quoting *Willingham*, 395 U.S. at 409). He and the Government now complain essentially that the court took that presentation too seriously.

In this light, the district court understood this case to involve a "Westfall Act certification[] based on an argument that no harm-causing incident ever took place." Pet. App. 14a. Likewise, the court of appeals identified a circuit split in cases "where, *as here*, the Attorney General's scope certification amounts to a denial that any wrongdoing occurred." Pet. App. 4a (emphasis added); *accord* Pet. App. 3a (observing that the Government "denied . . . that Haley interfered with [petitioner's] continued employment."). This is, then, truly a case involving an incident-denying certification.

Second, as to whether it would "have been outside the scope of Haley's employment for him to influence petitioner's termination," Haley Br. at 38, petitioner did not dream up the Government's concession. Rather, the *Sixth Circuit* understood that the Government "*conceded* that if Haley induced [petitioner's] firing, he acted outside the scope of his employment." Pet. App. 3a (emphasis added). That understanding is supported by a statement in the Government's

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[3] The Government's attempt to disavow the categorical nature of Haley's declaration, *see* Haley Br. at 38-39 n.11, is not credible. That declaration, and Paragraph 6 in particular, speaks for itself. *See* J.A. 47-48.

appellate brief—"the Memorandum of Understanding [between the Forest Service and LBLA] only showed that, if Haley did cause [LBLA] to fire [petitioner], he acted outside the scope of his employment," Haley Br. at 37-38—and by the course of proceedings in the district court. That court ruled (expressly citing the Memorandum) that "any interaction Mr. Haley might have had regarding [petitioner's] employment was out of the scope of his duties with the Forest Service." Pet. App. 23a. In seeking reconsideration, the Government aggressively challenged other aspects of the district court's order, but its motion did not even mention the Memorandum of Understanding, let alone confront the court's ruling on its significance. *See* J.A. 40-50.

4. Finally, the Government contends that the construction of § 2679(d)(2) advanced by *Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993) (en banc), and adopted by petitioner would "allow plaintiffs to deny federal employees the benefits of the Westfall Act through artful pleading." Haley Br. at 39 (section heading). While the Government admits that the *Wood* supplies district courts with wide latitude to confront artful pleading by "resolv[ing] any . . . factual conflicts, relevant to immunity, prior to trial," *id.* at 40 (quoting *Wood*, 995 F.2d at 1129), it posits a "practical, as well as theoretical, difficulty in drawing the kind of distinctions between *characterization* of an incident and *denial* of an incident that the *Wood* majority envisioned," *id.*

The two cases cited by the Government belie its assertion of "difficulty." In *Kimbro v. Velten*, 30 F.3d 1501 1502 (D.C. Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995), a plaintiff alleged that a federal employee "viciously struck [her] on the right arm." The defendant did not need to "characterize" the incident; she simply denied it outright, submitting a "sworn declaration claiming that she did not recall ever touching" the plaintiff. In *Melo v. Hafer*, 13 F.3d 736, 741 (3d Cir. 1994), the question was whether the defendant federal employee "had turned over a list of suspected jobbuyers within the Auditor General's Office in order to assist

Barbara Hafer in her political campaign for Auditor General." Again, the employee did not need to "characterize" the incident; he too denied it outright, declaring under oath that "although he investigated plaintiffs in the course of his official duties, . . . he did not provide the information about the plaintiffs to Hafer before she was sworn in as Auditor General following her successful campaign." *Id.* at 740. In the present case, of course, the Sixth Circuit had no trouble perceiving that "the Attorney General's scope certification amounts to a *denial* that any wrongdoing occurred." Pet. App. 4a (emphasis added).

In any event, the conceivable difficulty in drawing distinctions under the *Wood* analysis is far outweighed by the concrete distortions that the Government's approach would introduce into federal tort litigation. As several courts of appeals have recognized, that approach expressly contemplates "inquiry into merits facts." *Melo*, 13 F.2d at 476. Indeed, it "requir[es] a decision on the merits of [a plaintiff's] claim." Pet. App. 3a; *see also Kimbro*, 30 F.3d at 1505, 1507 (recognizing that "the scope question and the merits often overlap—sometimes exactly"—such that "to resolve the disputed factual issue" is "really [to resolve] the whole case").

As a theoretical matter, none of this can be reconciled with the Court's repeated teaching that "a claim of immunity is conceptually distinct from the merits of the plaintiff's claim." *Mitchell*, 472 U.S. at 525; *see also* Pet. Br. at 29-30 (citing other decisions to this effect). As a practical matter, moreover, the merits-encompassing judicial factfinding contemplated by the Government "impos[es] a major restraint upon the plaintiff's right to a jury trial," *Wood*, 995 F.2d at 1130—a restraint without warrant in the Act, *id.* at 1126.

But that restraint is only the start. The Government's approach realistically dictates, for potentially *every* state-law tort claim brought against a federal employee, litigation of the whole case on the merits under *sui generis* procedures not seen even in actions involving qualified immunity from constitutional torts. Thus, Third Circuit contemplated:

- some—but not too much—discovery for the plaintiff, who "should then be called upon to come forward, as if responding to a motion for summary judgment, with competent evidence supporting the facts upon which he would predicate liability";
- some sort of determination by the district court whether the plaintiff's evidence is indeed "competent";
- if it is, then some discovery for the employee defendant and the Government;
- "an evidentiary hearing at which both sides will tender their evidence on all disputes material to the scope of employment issue," which issue will coincide with the merits; and
- a resolution by the court (sitting without a jury) of "all issues of fact or law relevant to that issue."

Melo, 13 F.3d at 747; *accord Kimbro*, 30 F.3d at 1509.

Furthermore, given the Government's position that an "important aspect of [any] claim of absolute immunity" is "the right to take an immediate appeal if immunity is denied by the trial court," Haley Br. at 14-15, a court's finding that the plaintiff had indeed come forward with "competent evidence" to support liability would presumably trigger the right to an immediate appeal by the defendant employee. This notwithstanding the Court's ruling that even in a qualified immunity case, an order that "determines only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial," is *not* immediately appealable. *Johnson v. Jones*, 515 U.S. at 313.

Having emphasized that the federal removal statutes "do not require the officer virtually to 'win his case before he can have it removed,'" Haley Br. at 30, 46 (quoting *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999) (quoting *Willingham*, 395 U.S. at 407)), it is ironic that the Government would propose a construction of the Westfall Act that would require the plaintiff virtually to win her case before she can have it tried. For the reasons set forth above and in

petitioner's opening brief, that construction is wrong, and the Attorney General lacks authority under the Act to issue an incident-denying certification.

III. Remand Is Compelled Where Removal Is Based on an Unauthorized Certification.

The second question presented is "[w]hether the Westfall Act forbids a district court to remand an action to state court upon concluding that the Attorney General's purported certification *was not authorized by the Act*." *Supra* p. i (emphasis added). Petitioner's opening brief showed that removal based on such an unauthorized certification is improper and obliges a remand under the terms of 28 U.S.C. § 1447(c), and that nothing in the Westfall Act overcomes this statutory obligation to remand. *See* Pet. Br. at 34-41.

1. Again, however, the Government's brief does not answer the question presented. Though advancing a solid argument against the remand of Westfall Act cases where the certification was *authorized*, *see* Haley Br. at 41-44, the Government shrugs off the actual question with the bare assertion that "the Attorney General's certification [in this case] was not a nullity," i.e., it was authorized by the Act, *id.* at 45. In effect, the Government has no answer to petitioner's showing that the remand of a case removed on the basis of an *unauthorized* certification is *compelled*.[4]

2. Given the Government's failure to challenge petitioner's statutory analysis with respect to remand, it is not strictly necessary to address the constitutional issue. Even so, we briefly address it in order to illuminate some points that may be obscured by the Government's argument.

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[4] In particular, the Government has no answer to petitioner's observation that the term "conclusively" found in the final sentence of § 2679(d)(2) cannot categorically foreclose remand in all circumstances, as the statute obviously does not authorize the Attorney General to remove *criminal* cases, cases commenced in a *tribal* court, or cases in which *trial had already begun*. *See* Pet. Br. at 38 n.13; *see also supra* pp. 3-4.

The Government contends that "giving conclusive effect to the Attorney General's certification is not contrary to Article III." Haley Br. at 45 (section heading). Petitioner continues to acknowledge that where a certification *properly* invokes the Act and *properly* removes the case to federal court, it is fairly said that the case " 'arises under' federal law, as that term is used in Art. III." *Lamagno*, 515 U.S. at 435 (plurality opinion) (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983)). But where (as here and in other cases involving incident-denying certifications) the Act is not properly invoked, the case cannot be said to raise a "question of substantive federal law at the very outset." *Id.* (quoting same). In such cases, the federal court will certainly *not* engage in "substantive review of the Attorney General's scope certification and resolution of the availability of federal immunity." Haley Br. at 48. As we have explained, this is because an incident-denying certification does not truly raise the question of immunity.

To join the Government in drawing an analogy to the federal officer removal statute, *see* Haley Br. at 46-47, it is also fairly said that rejection of an incident-denying certification as unauthorized by the Westfall Act is akin to rejection of a federal officer's defense as not even "colorable." In that circumstance, as made clear in *Mesa v. California*, 489 U.S. 121 (1989), remand for lack of jurisdiction is compelled. To do otherwise —to retain the case in federal court merely because the defendant was a federal employee and the Attorney General had issued a piece of paper that did not (by definition) truly invoke a federal immunity defense —"would eliminate the substantive Art. III foundation of [the Westfall Act] and unnecessarily present grave constitutional problems." *Id.* at 137.

For these reasons, as well as the reasons set forth in petitioner's opening brief, a removal based on an incident-denying certification is improper and obliges a remand to state court under § 1447(c), and nothing in the Westfall Act overcomes that obligation.

CONCLUSION

The judgment of the court of appeals should be vacated for lack of jurisdiction. Alternatively, that judgment should be reversed on the merits. In either event, the judgment of the district court remanding this action to the Trigg County (Kentucky) Circuit Court should be reinstated.

Respectfully submitted.

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In The
Supreme Court of the United States

PAT OSBORN,

Petitioner,

v.

BARRY HALEY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For the Sixth Circuit

BRIEF OF THE STATES OF CALIFORNIA, IOWA, MISSISSIPPI AND WEST VIRGINIA, AS *AMICI CURIAE*, SUPPORTING THE PETITIONER

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QUESTIONS PRESENTED

This *amicus curiae* brief addresses the following questions:

1. Whether the Westfall Act authorizes the Attorney General to certify that the employee was acting within the scope of his office or employment at the time of the incident solely by denying that such incident occurred at all.

2. Whether the Westfall Act forbids a district court to remand an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Act.

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BRIEF OF *AMICI CURIAE*

The *Amici Curiae* States of California, *et alia* ("*Amici* States"), respectfully submit their brief as *amici curiae* through their respective Attorneys General pursuant to Supreme Court Rule 37.4.

INTEREST OF THE *AMICI CURIAE* STATES

This case concerns whether the Federal Employees Liability Reform and Tort Compensation Act of 1988 ("Westfall Act") authorizes a federal court to exercise and retain jurisdiction over a garden-variety tort claim that would ordinarily be resolved before a state court. When a federal employee is sued in tort, the Westfall Act authorizes the United States Attorney General, or his designee, to certify that the employee "was acting within the scope of his office or employment at the time of the incident out of which the claim arose. . . ." 28 U.S.C. § 2679(d)(1). The effect of such a certification is threefold: the United States is substituted as the defendant in the place of the defendant federal employee, who is dismissed; the action proceeds as one under the Federal Tort Claims Act, subject to all its attendant procedural requirements; and if the action was filed in state court, as was this action, it is removed to federal court. This Court has already determined that Westfall Act certifications are reviewable. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 427 (1995). This case may determine whether a faulty Westfall Act certification is sufficient to eliminate state court jurisdiction.

The *Amici* States acknowledge that this case may be controlled by this Court's recent decision in *Kircher v.*

Putnam Funds Trust, 05-409, ___ U.S. ___ (2006) (holding that orders remanding a case for want of preclusion under the Securities Litigation Uniform Standards Act of 1988 are not appealable under 28 U.S.C. § 1447(d)), and determined by the third question presented. However, if the Court reaches the other questions presented, its decision will likely resolve two related issues of statutory construction that taken together have important constitutional implications: whether a Westfall Act certification premised solely on denial of the alleged tortious incident is a valid basis upon which a federal court may assert subject matter jurisdiction; and whether a district court is authorized to remand an action to state court when it concludes that a Westfall Act certification is invalid. The States are interested in the interpretation given to these provisions of the Westfall Act because the reasoning of the Sixth Circuit below would extend federal jurisdiction over a type of claim that the Constitution leaves to the States – tort actions between nondiverse citizens. The *Amici* States are concerned that the Sixth Circuit's decision constitutes a usurpation of state court jurisdiction that is neither contemplated by the Westfall Act, nor authorized by the Constitution. The *Amici* States therefore have a substantial interest in this case.

STATEMENT

Petitioner Pat Osborn alleges that her former employer, respondent Land Between the Lakes Assoc. ("LBLA"), a private contractor that provides services to the United States Forest Service ("Forest Service"), was induced to terminate her employment by respondent Barry Haley, a Forest Service employee. Osborn filed suit

against Haley and others in the Trigg County Circuit Court, in Trigg County, Kentucky, claiming that Haley's actions fell outside the scope of his federal employment. Pet. App. 3a. Forest Service employees are prohibited from "participat[ing] in any LBLA decision concerning the realtionship of the LBLA to the Forest Service, including but not limited to . . . hiring or firing LBLA employees." Pet. App. 3a. The United States concedes that if Haley did induce Osborn's firing, his conduct would fall outside the scope of his federal employment. Pet. App. 3a. Nevertheless, on Haley's behalf the United States invoked its Westfall Act authority by certifying "that Haley had been acting *within* the scope of his employment at the time of the incident giving rise to [petitioner's] allegation." Pet. App. 3a. This certification was not premised on the nature of the allegations contained in the complaint, but solely on "incident denial" – the United States' contention that the alleged conduct never occurred. The action was removed to federal court, on the sole basis of this certification. The United States then moved to substitute itself as defendant in Haley's place, and to dismiss the action on the grounds that Osborn had failed to exhaust her administrative remedies under the Tort Claims Act. Pet. App. 19a.

The district court overruled the Government's notice of substitution and scope-of-employment certification, and denied the motion to dismiss, holding that a certification asserting that the harm-causing incident never took place does not satisfy the requirements of the Westfall Act. Pet App. 3a, 20a. The district court then concluded that "the absence of the United States as a party to this case destroy[ed] this Court's jurisdiction" and compelled remand to the state court. Pet. App. 20a. The Sixth Circuit reversed the district court order remanding the action to the

Trigg County Circuit Court, reasoning that "where the Attorney General's certification 'is based on a different understanding of the facts than is reflected in the complaint,' [citation omitted] including a denial of the harm-causing incident, the district court must resolve the factual dispute." Pet. App. 8a. The Sixth Circuit also held that, even if the substitution is ultimately found to be invalid, the Westfall Act forecloses remand because it provides that the certification "shall *conclusively* establish scope of office or employment for *purposes of removal.*" Pet. App. 10a.

SUMMARY OF ARGUMENT

The Westfall Act's plain text, history, and purposes all demonstrate that Congress intended that federal employees be immunized from their tortious acts only when those acts occurred within the scope of their federal employment. The Sixth Circuit's decision below giving effect to an Attorney General certification based solely upon incident denial exceeds the scope of the congressional authorization, and has practical effects that Congress did not intend. The decision below would strip the States of the Union of their traditional jurisdiction over tort claims arising outside the scope of federal employment, premised solely upon the fact the defendant is a federal employee. As a result, the federal government would bear the cost of providing a forum, defending the employee, and perhaps paying a judgment, notwithstanding the absence of any federal interest.

In the event the Court determines that an Attorney General certification premised solely upon incident denial

is invalid, the district court's retention of jurisdiction over this case would exceed the limits of its Article III jurisdiction and thereby prevent the state courts from adjudicating a case over which they have exclusive jurisdiction. The plain language of the Westfall Act does not compel district courts to retain jurisdiction when the Attorney General's certification is invalid. The doctrine of constitutional avoidance, therefore, requires the Westfall Act to be construed to allow this case, and others like it, to be remanded back to state court.

ARGUMENT

The court of appeals held, and the respondents here contend, that a federal employee who has engaged in tortious conduct outside the scope of his federal employment may enjoy the same Westfall Act protections that Congress intended only to confer upon employees acting within the scope of their federal employment. Further, the court held that when a district court determines that the federal government's invocation of the Westfall Act was faulty, and erroneously deprived a state court of its jurisdiction, the district court is powerless to remand the action. These holdings are not supported by the text or purposes of the Westfall Act, and offend the sovereign dignity of the States by authorizing the divestiture of their courts' rightful jurisdiction in violation of the Constitution.

A. The Westfall Act Does Not Authorize Attorney General Certification Based Solely on Incident Denial

Under the Westfall Act, the Attorney General has authority to certify that a tortious incident is within the scope of a federal employee's duties, but he has no authority to certify that the incident never occurred. The key section provides:

> The remedy against the United States provided by [the Federal Tort Claims Act] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee.

28 U.S.C. § 2679(b)(1). The next section of the Westfall Act provides that the Attorney General is required to defend a federal employee against any civil action brought for "any such damage or injury." 28 U.S.C. § 2679(c). "*Such* damage or injury" necessarily refers to damage or injury arising from the aforementioned "negligent or wrongful act or omission of any employee of the Government while acting *within the scope* of his office or employment" (emphasis added).

The application of the Westfall Act is dependent upon the Attorney General certifying "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. §§ 2679(d)(1), (d)(2), *see also* 28 C.F.R.

§ 15.3 (1995) (allowing certification by the Attorney General's designee). Determining whether an employee acted within the scope of employment "at the time of the incident out of which the claim arose" is a distinct proposition from determining whether the claim is bogus. The Attorney General will almost never be in a position to "certify" in any meaningful way that alleged tortious conduct did not occur. Whether such conduct occurred is not a matter for Attorney General certification, but for a jury determination. On the other hand, the Attorney General or his designee are uniquely competent to certify scope of employment based upon a legal analysis of the complaint. This would explain why Congress requires only that present "all process served upon him" to the United States Attorney through procedures established by the Attorney General. 28 U.S.C. § 2679(c). In short, there is nothing in the plain text or structure of the Westfall Act that would give effect to a certification based solely on incident denial.

A construction of the Westfall Act that gives effect to an Attorney General certification premised solely on incident denial would also lead to practical consequences that Congress could not have intended, and this Court should not impose. It is difficult to imagine what legitimate federal administrative or judicial interest there might be in interceding in garden-variety tort litigation between private litigants that does not actually arise within a federal employment relationship. It is clearly not legitimate if the purpose is merely to defeat the plaintiff's choice of forum, and to strip the state courts of their jurisdiction. *See Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 477 (1982) ("state courts are presumed competent to interpret state laws"); *Tafflin v. Levitt*, 493 U.S. 455, 458

(1990) ("Under [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States"). Moreover, the burdens upon the federal taxpayer that follow certification are substantial. The employee is provided a defense and absolute immunity to suit, the federal government assumes liability for any judgment rendered for the plaintiff, and the federal courts assume the burden of adjudicating the case. Yet the Westfall Act does not suggest that Congress intended the United States to assume these burdens unless the employee was acting within the scope of federal employment.

Nor does the history of the Westfall Act suggest any reason to read into the Act a countertextual application to employees sued for conduct arising *outside* the scope of their federal employment when the United States alleges the incident never occurred. The Westfall Act was enacted in response to this Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), which held that federal officials are absolutely immune from state tort claims for money damages, but only if their conduct was both within the scope of employment and discretionary in nature. *Id.* at 299; *see also Lamagno*, 515 U.S. at 417. The *Westfall* decision narrowed the scope of federal employee immunity. In response, Congress acted quickly to ensure that all federal employees would be absolutely immune to any claim arising from conduct within the scope of their federal employment. It accomplished this by amending the Federal Drivers Act, 28 U.S.C. § 2679 (1982) (FDA), and expanding its reach to cover all federal employees acting "within the scope of their employment" without any limitation based upon the discretionary nature of the conduct at issue. 28 U.S.C. § 2679; *see Lamagno*, 515 U.S.

at 425. The Westfall Act was enacted to address the concern that the *Westfall* decision had improperly limited federal employee immunity, not to expand such immunity. If Congress had intended to extend the benefits of the Westfall Act to all federal employees, or all federal employees deemed worthy by the Attorney General, it could easily have said so.

Finally, nothing in the Westfall Act's House Report evinces an intent to allow the extension of Westfall Act benefits to employees sued for conduct arising outside the scope of their federal employment. To the contrary, the Westfall Act's House Report states that "[i]f an employee is *accused* of egregious misconduct, rather than mere negligence or poor judgment, then the United States may not be substituted as the defendant, and the individual employee remains liable." H.R. Rep. 100-700, 1988 U.S.C.C.A.N. 5945, 5949 (1988) ("House Report") (emphasis added). This language supports the notion that the Westfall Act was not intended to affect cases arising outside the scope of federal employment because "egregious" conduct is categorically excluded. It also suggests that the scope-of-employment certification ought to be premised upon the allegations of the complaint, rather than the Government's theory of the defense, because the employee remains liable who is merely "accused" of egregious conduct. This understanding is compatible with the Westfall Act's use of the term "claim." The "accusation" referred to in the House Report is the "claim" that is described in the plaintiff's complaint, and is the "claim" that supports the certification of the Attorney General under § 2679(d).

B. When a District Court Exercising Removal Jurisdiction Determines That the Attorney General Certification That Caused Removal Under the Westfall Act Is Faulty, the Action Must Be Remanded

The exercise of federal jurisdiction premised upon a faulty Attorney General certification not only violates the text and purposes of the Westfall Act, but also gives rise to a troubling constitutional question involving the proper scope of Article III jurisdiction. The retention of such jurisdiction will inevitably intrude upon the States' interest in having state law claims adjudicated by their domestic courts as an exercise of retained state sovereignty. Because federal courts are not authoritative interpreters of state law, States also have an interest in retaining jurisdiction to ensure that state law claims are resolved correctly. Accordingly, when interpreting the statute, this Court should give due weight to the constitutional doubt doctrine and the general presumption against federal jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377 (1994).

1. The text of the Westfall Act is best read to authorize remands of cases improperly certified by the Attorney General

Congress did not intend that federal courts would, on the basis of a faulty Attorney General certification, retain jurisdiction over otherwise routine state tort claims. Section 2679(d)(2) provides that where the Attorney General certifies that the employee acted within the scope of employment at the time of the alleged incident, that certification is conclusive "for purposes of removal." This language establishes only that removal to federal court

must occur upon certification. It is silent, however, regarding whether a district court must remand a case where the certification is determined to be faulty. In contrast, section 2679(d)(3) concerns cases where the Attorney General declines to certify that the defendant employee was acting within scope of federal employment at the time of the alleged tortious conduct. When this happens, the defendant federal employee may remove an action filed in state court for a scope-of-employment determination by the federal court. If successful, the substitution of the United States is compelled. If unsuccessful, the Westfall Act states that the action "shall be remanded." 28 U.S.C. § 2679(d)(3); *see Lamagno,* 515 U.S. at 431, n.7.

The remand question should be approached in the same manner as the judicial review question was approached in *Lamagno*. In *Lamagno*, the Court concluded that Congress authorized judicial review of Attorney General certifications by harmonizing sections 2679(d)(2) and 2679(d)(3), only the latter of which authorizes judicial review expressly. *Lamagno,* 515 U.S. at 431. The harmonization of sections 2679(d)(2) and 2679(d)(3) is equally appropriate here. Allowing federal courts to remand cases to state courts under both sections (d)(2) and (d)(3) would neither erase the differences between these two sections, nor render scope-of-employment certifications meaningless. To the contrary, the principal purpose of the certification process – guaranteeing that scope of employment determinations are made in a federal forum – would remain satisfied. Moreover, there appears to be no reason that remand would be less appropriate after an Attorney General certification is deemed invalid than after a defendant's motion for certification is denied. In both instances, a federal court has determined that the nature of the

allegations against the federal employee are such that the conduct occurred outside the employment relationship, and so they are not encompassed by the Westfall Act.

2. The Westfall Act should be interpreted to avoid the substantial constitutional question that will arise if federal courts are permitted to adjudicate state law claims between non-diverse individual citizens

Construing the Westfall Act to require remand where the Attorney General's scope-of-employment certification is faulty is consistent with the doctrine of constitutional avoidance. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) ("a statute is to be construed where fairly possible so as to avoid substantial constitutional questions"). Permitting a federal court to retain a case after determining that no federal issue or diversity of citizenship exists would raise a serious constitutional question regarding whether the scope of Article III jurisdiction has been exceeded. *Lamagno,* 515 U.S. at 437 (O'Connor, J., concurring); *id.* at 438 (Souter, J., dissenting). Requiring remand would avoid this constitutional question, while in no way undermining the purposes of the Westfall Act.

The federal principles that are embodied in the constitutional design are reflected in the Constitution's enumeration of the areas over which federal courts would have jurisdiction.

> The judicial authority of the federal judicatures is declared by the Constitution to comprehend certain cases particularly specified. The expression of those cases marks the precise limits beyond which the federal courts cannot extend

> their jurisdiction, because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority.

Federalist 83 (Hamilton), in Clinton Rossiter, ed., The Federalist Papers 495, 497 (New American Library 1961). The Constitution provides jurisdiction to the federal courts as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const., art. III, § 2. Article III does not grant jurisdiction over this case premised upon the presence of the United States as a party, because where an Attorney General's certification is deemed faulty, and the individual defendant is resubstituted, the United States is dismissed. *Lamagno*, 515 U.S. at 431. Accordingly, where (as here) the parties are not diverse, the only conceivable basis for jurisdiction is the "arising under" clause.

Article III's "arising under" jurisdiction was first interpreted by this Court in *Osborn v. Bank of the United States*, 22 U.S. (Wheat.) 738 (1824). In *Osborn*, Chief

Justice Marshall ruled that the federal statute establishing the charter of the Bank of the United States, creating the bank, and authorizing it to act, formed "an ingredient of the original cause" such that the exercise of federal jurisdiction over a controversy concerning the State of Ohio's efforts to levy a tax against the bank was authorized by Article III. Accordingly, since *Osborn*, for a case to "arise under" federal law, it must contain a "federal ingredient."

While federal courts have the authority to interpret statutes granting them jurisdiction, the determination of a federal court's jurisdiction is not itself a "federal ingredient" within the meaning of *Osborn v. Bank of U.S. See Mesa v. California*, 489 U.S. 121, 136 (1989) (describing a jurisdictional statute as one that could not "independently support Art. III 'arising under' jurisdiction"). While the Westfall Act appears to have both substantive and procedural elements, court review of an Attorney General certification has purely jurisdictional implications, akin to a federal court's review of its diversity jurisdiction under 28 U.S.C. § 1332. When a federal court determines that a case has been improperly removed from state court on an assertion of federal diversity jurisdiction, the case will be remanded to state court for lack of federal subject matter jurisdiction. 28 U.S.C. § 1447(d). The underlying dispute in this and other tort cases arising outside the scope of federal employment – whether a tort has been committed, and if so the nature and extent of damages flowing from the tort – falls squarely within traditional state court jurisdiction and is governed by the resolution of no federal issue. Accordingly, there appears to be no constitutional basis for the exercise of federal jurisdiction over this case.

Like the district court below, in *Lamagno* the four dissenting Justices, and Justice O'Connor, expressed grave concern that rejection of an Attorney General's certification under the Westfall Act would terminate federal question jurisdiction and compel remand in cases where there is no diversity of citizenship. *See Lamagno*, 515 U.S. at 437 (O'Connor, J., concurring in part); *Lamagno*, 515 U.S. at 442 (Souter, J., dissenting). Justice Ginsberg, writing for a plurality of the Court, dismissed this concern, viewing as a "nonfrivolous federal question" the review of the Attorney General's scope of employment certification. *Id.* at 435. However, the resolution of this question merely answers whether federal courts have jurisdiction, it does not itself establish federal jurisdiction. And this case raises an additional problem not present in *Lamagno* and not anticipated by Justice Ginsburg's view of the remand question. Here, the Government concedes that the scope-of-employment certification is not premised upon the allegations of the complaint, as required by the Westfall Act (*see* discussion in Section A, *supra*), but merely upon denial of the incident. If such certifications may be used to remove cases from state courts, and bar remand after resubstitution of a federal employee, state court jurisdiction can be preempted by executive fiat, and without congressional authorization.

That this construction of the Westfall Act would offend concepts of federalism is underscored by the comparison of the implications of the Sixth Circuit's decision with federal courts' exercise of supplemental jurisdiction over state claims. When a federal court considers whether to exercise supplemental jurisdiction, it weighs concerns for judicial economy and a desire to avoid deterring federal claims against the States' interests in comity and federalism. *See City of Chicago v. International College of Surgeons*, 522

U.S. 156, 173 (1997) ("a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity"). By contrast, if federal courts are permitted to exercise jurisdiction pursuant to faulty Attorney General certifications under the Westfall Act, federalism concerns would be given no consideration, and would be counterbalanced by no cognizable federal interest because there is no federal claim to discourage, and the federal employment relationship is not implicated. Moreover, because the certification determination will normally be made at the outset of the litigation, the concern for judicial economy implicated by the exercise of supplemental jurisdiction would not be a factor weighing in favor of federal court retention of jurisdiction. These realities also suggest that the line of federal court jurisdiction under the Westfall Act should be drawn where Congress has said it should be drawn – where the nature of the alleged tortious conduct is within the scope of federal employment.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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